No. 7657

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY W. BERDIE, et al,
Defendants and Appellants,

vs.

CHARLES J. KURTZ, et al,
Plaintiffs and Appellees.

BRIEF FOR APPELLEES

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AUTHORITIES—*Continued*

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Statement of the Case

By this action, plaintiffs and appellees seek to restrain and enjoin defendants and appellants from interfering with the conduct of the business of selling and distributing milk and cream as carried on by the several plaintiffs in the Los Angeles sales area. The Los Angeles sales area is entirely within the State of California. It includes only Los Angeles and Orange Counties and the adjacent westerly portions of Riverside and San Bernardino Counties. Each of the plaintiffs is engaged in the production and/or distribution of milk in said area, and each of the plaintiffs buy from numerous other producers in addition to their own production. All of said milk so purchased by plaintiffs is likewise produced in said area. All milk produced or purchased by plaintiffs

is sold and distributed entirely within the State of California.

Defendant and appellant, H. W. Berdie, is Regional Representative of the Licensing and Enforcement Section of the Agricultural Adjustment Administration of the United States Department of Agriculture, and assumed and claimed the right and power of enforcement of the provisions of License No. 17 and of the Marketing Agreement hereinafter more particularly mentioned. (R. 7.)

Los Angeles Milk Industry Board and its component members, to-wit, Richard Cronshey, William Corbett, David P. Howells, George A. Cameron, F. A. Lucas, Earl Maharg, A. G. Marcus, M. H. Adamson, T. E. Day, W. H. Stabler, Max Buechert, C. W. Hibbert, W. J. Kuhrt, George E. Platt, A. M. McOmie, T. H. Brice, T. M. Erwin, A. R. Read, R. C. Perkins and Ross Weaver, defendants and appellants herein, are members or claim to be members of said Los Angeles Milk Industry Board, and claim to have been selected in accordance with the provisions of License No. 17, and claim to have the right to exercise and do exercise the rights and duties and to do the things required of them under the provisions of said License No. 17, as hereinafter more particularly mentioned. (R. 5-6.)

Defendant and appellant, Milk Producers, Inc., is a corporation or association organized under the laws of the State of California as a cooperative non-profit corporation; its name was originally Producers Arbitration Committee, Inc., and has been regularly changed to Milk Producers, Inc. (R. 7.)

Defendant and appellant, Anders Larsen, claims to be the Enforcement Officer of the Agricultural Adjustment Administration of the United States Department of Agriculture Los Angeles sales area, appointed as such by the Secretary of Agriculture of the United States, and claims the right and power of enforcement of the provisions of Licenses Nos. 17 and 57 hereinafter more particularly mentioned, and of all orders of the Secretary of Agriculture. (R. 58-59.)

Defendant and appellant, H. C. Darger, is Market Administrator, appointed as such by the Secretary of Agriculture of the United States, under and pursuant to the provisions of License No. 57, and assumes and claims the right and power of enforcement of the provisions of said License No. 57, hereinafter more particularly mentioned. (R. 59.)

Defendant and appellant, Peirson M. Hall, is the United States District Attorney for the Southern District of California, and is the person designated by the Agricultural Adjustment Act, more particularly Section 8a, subdivision 7 thereof, to institute proceedings to enforce the remedies and to collect the forfeitures provided for, in or pursuant to said Agricultural Adjustment Act. (R. 59.)

Each and all of the defendants and appellants claim to have or assert the right and power to enforce the provisions of said Licenses Nos. 17 and 57, or one of them, among these provisions being the right and power to allot to each producer of milk in said area, a production base, and to refuse such bases from time to time as may be deemed necessary or advisable; to require of

each distributor of milk in the Los Angeles sales area, reports in such manner and containing such information as may be prescribed; to require each distributor to account for all of his sales, of the different classes or uses of milk, at the prices named in the said licenses; to fix the price to be paid by distributors to producers for milk delivered; to maintain adjustment accounts for each distributor, and to require such distributor to deduct and retain certain sums from each producer and to pay such sums under License No. 17, to Milk Producers, Inc., or to the Los Angeles Milk Industry Board; and under License No. 57, to defendant and appellant Darger as such Market Administrator; to collect debit balances thus shown, and to pay credit balances; to collect from distributors who purchase milk from producers who are not members of an association of producers, certain amounts based upon the pounds of butter fat purchased and distributed by said producer, and to require the distributor to deduct the same from payments due the producer; to examine the books and records of distributors, and under License No. 57, defendant and appellant Darger as such Market Administrator claims the right to require a bond from each distributor for the purpose of securing the fulfillment of such distributor's obligation. (R. 65-80, 95-103, 110.)

That none of the acts hereinbefore set forth are required to be reported to or approved by the Secretary of Agriculture or by any other person or officer. (R. 33-45, 117-150.)

For the period commencing November 20, 1933, and expiring May 31, 1934, the defendants and appellants

Harry W. Berdie, Milk Producers, Inc., Los Angeles Milk Industry Board and its component members, made numerous claims and demands upon the plaintiffs and appellees for the payments of various and sundry sums and amounts claimed to be due and owing by plaintiffs to Milk Producers, Inc. and Los Angeles Milk Industry Board; and commencing with the month of June, 1934, and subsequent thereto, defendant and appellant H. C. Darger, has claimed and demanded of plaintiffs and appellees various and sundry sums of money claimed to be due and payable from said plaintiffs under the provisions of License No. 57, none of which claims have been acquiesced in or consented to by plaintiffs herein, and none of which have been paid.

On the 16th day of November, 1933, the Secretary of Agriculture of the United States issued a document hereinafter mentioned, entitled License No. 17, License for Milk, Los Angeles Milk Shed, and purported to make it effective as of November 20, 1933, such License purportedly issued under and by virtue of the National Agricultural Adjustment Act, enacted on or about the 12th day of May, 1933, by the Congress of the United States, an act designated as an Act of May 12, 1933, Chapter 25, 48 Statutes, 73rd Congress, H. R. 3635, said Act being known as the "National Agricultural Adjustment Act."

On October 17, 1933, the Secretary of Agriculture of the United States signed a so-called Marketing Agreement for Milk in the Los Angeles Milk Shed, which was also signed by less than one-third of the persons, firms and corporations engaged in the business of producing

and/or distributing fluid milk in the Los Angeles sales area. None of these plaintiffs and appellees signed said agreement. Said agreement is referred to in said purported License No. 17. Said Marketing Agreement was revoked, cancelled and terminated by the Secretary of Agriculture on or about the 1st day of February, 1934.

On or about the 21st day of February, 1934, H. A. Wallace, Secretary of Agriculture, issued and caused to be served by registered mail upon each of the plaintiffs and appellees herein, an Order to Show Cause why the license of such plaintiff and appellee should not be suspended or revoked. Each such Order to Show Cause contained statements of alleged violations of the terms and conditions of License No. 17 charged against such plaintiff and appellee. On or about the 9th day of March, 1934, each of the plaintiffs and appellees made and filed their Answer to such Order to Show Cause and the charges therein contained, with said Secretary of Agriculture. (R. 81-83.)

On or about the 6th day of March, 1934, and prior to the filing of the Answers by the plaintiffs and appellees, and without further proceeding by the said Secretary of Agriculture, he, as the said Secretary of Agriculture, set the said Orders to Show Cause for hearing in Los Angeles, California, on the 16th day of March, 1934, and appointed one Arthur P. Curran, an officer and employee of the United States Department of Agriculture, as hearing and presiding officer, and in like manner appointed C. P. Dorr and Albert D. Hadley, officers and employees of said United States Department of

Agriculture, to represent the said Secretary of Agriculture as prosecutors at said hearings. (R. 84.)

On the said 6th day of March, 1934, all of the aforementioned hearings were consolidated. That plaintiffs and appellees, and each of them, specially and specifically objected to the jurisdiction of the presiding officer, said Arthur P. Curran, and of the Secretary of Agriculture, of and over the subject matter of the charges and of and/or over the persons or businesses of said plaintiffs and each of them, and objected to the holding of such hearing or trial, and moved that said proceedings and said Orders to Show Cause be dismissed upon the ground and for the reason that said presiding officer was not sitting as a court with jurisdiction to try the issues of said Orders to Show Cause and the Answers thereto; and further specially and specifically objected to such hearings upon all the grounds set forth in paragraphs XXIX and XLIX of the Supplemental Bill of Complaint for Injunction. (Tr., pp. 84 and 103.)

On the 31st day of May, 1934, R. G. Tugwell, Acting Secretary of Agriculture, issued a document entitled "Termination of License for Milk, Los Angeles Milk Shed," wherein and whereby he did by such order, terminate, effective on and after 12:01 A. M., Eastern Standard Time, June 1, 1934, said License No. 17, hereinbefore mentioned (Tr., p. 87); and thereafter, and on the 31st day of May, 1934, said Acting Secretary of Agriculture executed and issued a document entitled "License No. 57, License for Milk, Los Angeles, California, Sales Area," purporting to make the same effective on and after 12:01 A. M., Eastern Standard Time,

June 1, 1934, purporting to take such action under and by virtue of the provisions of said National Agricultural Adjustment Act. (Tr., p. 89.)

After the making of the objections before Arthur P. Curran, as hereinbefore set forth, and the overruling of such objection by the said Arthur P. Curran, and without consenting or acquiescing to the jurisdiction of the said Secretary of Agriculture, or any of his agents or employees, but expressly excepting thereto, testimony was introduced by the counsel and prosecutors for said Secretary of Agriculture, and the matters continued from time to time to and including the 18th day of June, 1934. On the 18th day of June, 1934, at Washington, D. C., in the continuance of said hearings, the said C. P. Dorr and Albert D. Hadley offered into evidence before the said Arthur P. Curran as such hearing and presiding officer, the order of the Acting Secretary of Agriculture, terminating License No. 17, hereinbefore referred to, which was received by said presiding officer and thereafter the said C. P. Dorr and Albert D. Hadley, as officers and employees of the said United States Department of Agriculture, offered into evidence a certified copy of the new License No. 57, hereinbefore referred to, which was received in evidence over the objections of counsel for the plaintiffs and appellees herein; and after said order admitting said License No. 57 into evidence at said hearing, the said C. P. Dorr and Albert D. Hadley as such officers and employees of the United States Department of Agriculture, moved to amend the Orders to Show Cause theretofore issued against each of the plaintiffs herein on the 21st day of

January, 1934, as hereinbefore set forth, which said amendments charged or attempted to charge each of the plaintiffs herein with the violation of said License No. 57, and to cite and order each of the plaintiffs herein to show cause why their said Licenses under said License No. 57 should not be suspended or revoked, by reason of each of said plaintiff's failure to comply with the provisions of said License No. 57, relating to their compliance with the provisions of said License No. 17. Plaintiffs herein, through their counsel, each severally objected to such amendments upon the ground that the same were not amendments, but were the issuance of new citations and did not comply with the rules promulgated by the said Secretary of Agriculture relating to the revocation or suspension of licenses. Despite such objection, said Arthur P. Curran as such presiding officer and as such officer and employee of the United States Department of Agriculture, permitted the filing of said amendments to said Orders to Show Cause, as hereinbefore set forth, and thereupon plaintiffs herein, not being personally present or receiving service of such amendments to such Order to Show Cause, or any citations thereon, were not therefore represented in person or by counsel authorized to represent them on such new or amended Orders to Show Cause, and plaintiffs, nor any of them, have at any time received or been served pursuant to said regulations, with copies of such citations or amended Orders to Show Cause under License No. 57, as to why their licenses under said purported License No. 57 should not be revoked or suspended. (R. 98-100.)

On or about the 28th day of July, 1934, said H. A. Wallace as such Secretary of Agriculture, issued orders revoking and terminating the licenses of plaintiffs under said License No. 57, and the right of each of the plaintiffs herein to engage in the business of distributing fluid milk and cream within such Los Angeles sales area was thereby terminated, effective on and after 6:00 P. M., Pacific Standard Time, on the 28th day of July, 1934. (Tr. 100.)

Each of the plaintiffs herein has, for many years last past, conducted, and were, on the said 28th day of July, 1934, conducting, carrying on and engaging in the business of producing and/or distributing milk and cream within that part of the State of California designated in said Licenses as Los Angeles sales area, and each maintained a plant containing machinery and other apparatus to handle and process milk and cream in accordance with sanitary requirements as prescribed by the laws of the State of California, and by ordinances of the several cities within which said plants were located. It is shown by the complaint and was not disputed in the Court below, that all milk and cream sold for human consumption in the Los Angeles sales area is produced wholly within the State of California. All milk and cream which is produced in the Los Angeles sales area is sold wholly within the State of California, with the exception that an amount estimated to be less than 1/10th of 1% thereof is sent out of the State of California at sporadic, irregular intervals by distributors other than the plaintiffs herein. None of the plaintiffs have at any time brought into the State of California, or shipped

out of the State of California, any milk or cream whatsoever, but have, during all of said time been engaged solely in intrastate commerce. (R. 101-102.)

Some surplus milk produced in the Los Angeles sales area is used for manufacturing purposes and is converted into butter, powdered milk and other by-products. Some of these products are shipped out of the State, but such shipment takes place after process of manufacture has been completed, and in many instances after the manufactured product has been sold here. None of the plaintiffs herein, however, have been so engaged.

The affidavit of E. W. Gomnitz produced by the defendants and appellants herein, shows that *no milk or cream was exported from or imported into the Los Angeles sales area during the years 1931, 1932 and 1933;* that the total domestic exports of dairy products from Los Angeles (none of which was fluid milk or cream and including shipments to other parts of California) during 1933, was 117,669 pounds, and that the imports of dairy products into the Los Angeles sales area consisted entirely of butter and cheese, and that such imports were of considerable volume. Said Licenses Nos. 17 and 57 were solely confined by their terms to fluid milk and cream sold for human consumption within the Los Angeles Sales area, and contained no regulations for the importation, exportation, manufacture, distribution or handling in any way or manner of butter, cheese or other by-products.

The acts of defendants and appellants which plaintiffs seek to restrain and enjoin, are sought to be justified by the provisions of Licenses Nos. 17 and 57 imposed by

the Secretary of Agriculture, and these Licenses are in turn sought to be justified by the provisions of the Agricultural Adjustment Act of 1933. The pertinent provisions of the Act are:

Sec. 1. *Declaration of Emergency.*

> "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

Sec. 2. *Declaration of Policy.* "It is hereby declared to be the policy of Congress:

> "(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914."

Sec. 6. *General Powers.* "In order to effectuate the declared policy, the Secretary of Agriculture shall have power * * *

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof.

"Sec. 9. *Processing Tax.* (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor."

Section 9 provides for a processing tax to be paid by the processor upon the first domestic processing of the commodity and Section 19 provides that the taxes pro-

vided in the title shall be collected by the Bureau of Internal Revenue and paid into the Treasury of the United States. These provisions have not been followed in either License.

On the 16th day of November, 1933, the Secretary of Agriculture issued what is denominated "License No. 17, License for Milk, Los Angeles Milk Shed," effective November 20, 1933. This "License" purported to have been issued under the power conferred upon the Secretary by paragraph 3 of Section 8, of the Agricultural Adjustment Act.

Said License No. 17 recites that "the Secretary finds that the marketing of milk for distribution as fluid milk in the Los Angeles sales area and the distribution of said fluid milk are in both the current of interstate commerce and the current of intrastate commerce, which are inextricably intermingled." The appellants construe this to be a finding by the Secretary, binding on all people, that all milk handled in the Los Angeles sales area is handled in interstate commerce, even though it is entirely produced, distributed and sold within that small area in the State of California.

License No. 17 then provides that the Secretary "hereby licenses each and every distributor of fluid milk for consumption in the Los Angeles Sales Area to engage in the handling in the current of interstate or foreign commerce of said fluid milk, subject to the following terms and conditions."

Thus, it will be seen this was not a license in the ordinary acceptance of that word. No application for a license was required nor was any license issued to an

individual distributor. It was not a grant of a privilege to such as might apply, but was really a set of rules governing the conduct of the business of distributing fluid milk in the defined area only.

License No. 17, in "Exhibit D" attached thereto, creates the Los Angeles Milk Industry Board, to be composed of six producers, six distributors and a thirteenth member to be selected by a two-thirds vote of the twelve, and to be chairman of the board. It provides, in "Exhibit C" for the fixing of a "base" for each producer, to be determined by a percentage of his production from March 16, 1933, to June 15, 1933, some six months prior to the issuance of the license. It provides that Producers' Arbitration Committee, Inc., (now the appellant Milk Producers, Inc., the name having been changed) a private California cooperative corporation, will continue to operate a surplus plant to which is to be delivered all milk from producers in the Los Angeles Milk Shed having established bases in excess of the requirements of distributors as fluid milk, and that the losses of this surplus plant shall be charged against all deliveries of base milk whether to the surplus plant or to distributors.

License No. 17 provides that "distributors shall not purchase milk from any producer unless the producer authorizes the distributor (1) to pay over to Los Angeles Milk Industry Board an amount determined by it, not to be over ¼ cent per pound butterfat in all milk purchased; (2) if the producer is not a member of one of the five associations named, to pay over to Los Angeles Milk Industry Board an amount for each pound of butterfat equal to the average amount which the mem-

bers of those associations are then paying as dues; (3) to deduct each month (a) for deliveries in excess of base, the difference between the base price and the surplus price, and (b) for deliveries of base milk, the difference between the base price and the adjusted base price fixed by the Industry Board and Milk Producers, Inc." These deductions were to be paid to Milk Producers, Inc. Each distributor was also required to pay to the Industry Board, on his own account, up to ¼ cent per pound of butterfat purchased, and each producer-distributor was required to make all payments, including surplus, on his own production.

Thus, the price to be paid to producers was to be fixed each month by Los Angeles Milk Industry Board and Milk Producers, Inc. The milk income was to be spread over those producers who were in business on the dates named, thus discouraging new enterprises and causing a leveling of the income of the older operators. Those producers who had a market for their product, were to share their income with those who did not have such market. These plaintiffs, each of whom has by hard work built up a market for his milk, were compelled to pay a part of their income to Milk Producers, Inc., of which corporation none of the plaintiffs were members, in order that it might pay the uniform price to some other producer who may not have worked as hard, or may *not have had milk of equal quality,* or for some other reason did not have a market for his product.

The so-called production and surplus control plan first arbitrarily fixed the time from March 16th to June 15, 1933, as the "production base period."

A "marketing percentage" was to be arrived at by dividing the average daily deliveries of milk by all producers during the "production base period" into the daily average quantity of milk sold for consumption in the sales area during June, 1933.

The quota or "base" of each producer was to be arrived at by discovering his average daily production during the base period and applying the "market percentage" to that. For example, assume that the "marketing percentage" was determined to be 90; a producer whose average production during the "production base period" was 100 pounds of butterfat per day would be assigned a base of 90 pounds of butterfat per day. This would remain as his base whether his production increased or decreased. These "bases" were to be used in determining the amounts to be paid to producers for their milk.

What is called a "base price" to producers was fixed, to be changed from month to month as the price of 92 score butter changed on the Los Angeles market. When butter was 20 to 25 cents per pound, the "base price" was 51 cents per pound of butterfat; when the butter price was 25 to 30 cents, the base price was 61 cents.

However, the "base price" was not the price which the producer was to receive even for his "base" milk. It was the price which the distributor was to pay. Each month the Industry Board and Milk Producers, Inc., were to fix an "adjusted base price," which, after other deductions, was the amount the producer was to actually receive for his "base" milk. The distributor was required to deduct from the amount apparently due to the pro-

ducer various charges and pay the amounts thus deducted to the Industry Board and Milk Producers, Inc.

Thus, assume the case of a producer who had a "base" of 90 pounds of butterfat per day. when the "base price" was 51 cents, the "adjusted base price" fixed at 47 cents and the surplus price at 23 cents. This producer delivers 100 pounds of butterfat per day during one month of 30 days, or a total of 3,000 pounds during the month. At 51 cents per pound, this amounts to $1530.00. From this is deducted: (1) One-quarter cent per pound for the Industry Board, or $7.50; (2) 65/100 of a cent per pound because the producer is not a member of one of the named associations, or $19.50; (3) 3 cents per pound on all of his "base" milk, or 90% of his deliveries, amounting to $108.00; and (4) 28 cents per pound on all delivered in excess of his base, which was 300 pounds, amounting to $84.00. The total of these deductions is $219.00, leaving $1311.00 as the amount which the distributor may pay to the producer. The distributor must then add $7.50 as his contribution to the Industry Board and pay this, plus the $7.50 first deducted from the producer, plus the $19.50 of the deduction, or a total of $34.50 to the Industry Board, and pay the other deductions, amounting to $192.00 to Milk Producers, Inc. Milk Producers, Inc., may use a portion of this money to provide working capital for itself, and the balance in paying producers who delivered milk to it, the license providing that milk delivered to the surplus plant should be paid for at the same price as that delivered to distributors.

If the same producer, unaware that a license was to be issued, was unfortunate enough to have started in business after the 15th day of June, 1933, and prior to the date of the License, his base would have been fixed at about 22½ pounds per day and the result would be: (1) Deduct ¼ cent per pound, or $7.50; (2) deduct $19.50 for dues; (3) deduct 4 cents per pound on 675 pounds, or $27.00, and (4) deduct 28 cents per pound on 2325 pounds, amounting to $651.00, leaving $825.00 as the amount this producer would actually receive for his $1530.00 worth of milk.

The plaintiffs in this action are all in a class commonly referred to as distributors. None of them has ever used any of the facilities of the surplus plant. If they have a surplus of production, they find customers for it or carry it themselves. Notwithstanding these facts, they are, under the terms of the License, required to pay to the Industry Board and Milk Producers, Inc., amounts equal to the deductions required to be made from other producers and also the charge against distributors. These organizations claim the right to fix a "base" for each of them and for producers delivering milk to them and to collect the amounts of the deductions.

The charges of violations of the Licenses made against plaintiffs and each of them, and upon which the Secretary proceeded to try plaintiffs, consisted of the alleged failure of plaintiffs to meet the demands made upon them for such payments.

On the 31st day of May, 1934, R. G. Tugwell, Acting Secretary of Agriculture, made an order terminating

License No. 17, effective June 1, 1934, wherein it is ordered that the Secretary "hereby terminates the aforesaid license, but any and all obligations which have arisen, or which may arise in connection therewith, by virtue of or pursuant to such license, shall be deemed not to be affected, waived or terminated hereby."

On the 31st day of May, 1934, R. G. Tugwell, Acting Secretary of Agriculture, issued another document entitled "License No. 57—License for Milk—Los Angeles, California, Sales Area," effective June 1, 1934. This License also purports to have been issued under the power granted by paragraph 3, Section 8, of the Agricultural Adjustment Act. In it, the recital respecting interstate commerce is changed to read: "The Secretary finds that the marketing of milk for distribution in the Los Angeles Sales Area and the distribution thereof, are entirely in the current of interstate commerce, because said marketing and distribution are partly interstate and partly intrastate commerce and so inextricably intermingled *that said interstate commerce portion cannot be effectively regulated or licensed* without licensing that portion which is *intrastate commerce.*"

License No. 57 then provides that the Secretary "hereby licenses each and every distributor to engage in the business of distributing, marketing or handling milk or cream as a distributor in the Los Angeles Sales Area, subject to the following terms and conditions." The Los Angeles Sales Area is again defined as the territory within the boundaries of Los Angeles County, a portion of San Bernardino County, a portion of River-

side County, and Orange County, "all within the State of California."

License No. 57 contains a marketing plan which fixes the prices to be paid to producers, provides for the continuance and establishment of bases for producers and fixes minimum selling prices for distributors. It provides that the license shall be administered by a Market Administrator designated by the Secretary and who shall perform such duties as may be provided for him in the license." It provides that the Market Administrator shall be entitled to a reasonable compensation to be fixed by the Secretary; to borrow money to meet his cost of operation until such time as the first payments are made to him under the license and to incur such other expenses including compensation for persons employed by the Market Administrator, as the Market Administrator may deem necessary for the proper conduct of his duties and also that he shall not be held personally responsible in any way whatsoever to any licensee or to any other person for errors in judgment, mistakes of fact, or other acts, either of commission or omission, except for acts of dishonesty, fraud and malfeasance in office.

License No. 57 also provides that any distributor who does not sell or distribute whole milk for ultimate consumption in the Los Angeles Sales Area may purchase milk from producers who do not have established bases, and that such distributor is not subject to the terms of the license, except that he shall not sell cream to other distributors for distribution and ultimate consumption in the Los Angeles Sales Area at a price less than the

price at which he sells similar cream for consumption nearest to location where the milk is processed into cream, plus the cost of transportation.

License No. 57 also contains the following provision: "Each and every distributor shall fulfill any and all of his obligations which shall have arisen, or which may hereafter arise in connection with or by virtue of or pursuant to the license for milk in the Los Angeles Sales Area issued by the Secretary on November 16, 1933."

On the 11th day of January, 1934, plaintiffs and appellees commenced this action for the purpose of obtaining a judicial determination of the rights of plaintiffs and appellees; and thereafter, and on the 11th day of August, 1934, served and filed their notice of motion in the above entitlel cause for leave to file a Supplemental Bill of Complaint for Injunction herein; and on the 4th day of September, 1934, after argument thereon, the said Supplemental Bill of Complaint was ordered filed by the Hon. George Cosgrave, Judge of the District Court of the United States, in and for the Southern District of California, Central Division, and the Supplemental Bill of Complaint for Injunction was thereupon filed by the Clerk of said Court, and a temporary restraining order theretofore issued was continued in full force and effect, and thereafter, on the 20th day of September, 1934, said Court issued its preliminary injunction (Tr., page 254, et seq.) after full arguments and motions to dismiss.

ARGUMENT

The Existence of an Emergency Does Not Confer Additional Powers Upon the Federal Government

The Agricultural Adjustment Act recites that its enactment is prompted by a national economic emergency and it is argued that such emergency supports the Act and justifies the licenses.

An emergency, however, does not in any way enlarge the constitutional powers of the Federal Government.

This principle is well stated in the case of *Ex Parte Milligan,* 4 Wall. 2, 18 Law Ed. 281, in which the Supreme Court of the United States says:

> "Time has proved the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of many could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men forsaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great

> exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

In *U. S. v. Cohen Grocery Co.,* 255 U. S. 81, 65 Law Ed. 516, the charge was selling sugar at an unreasonable price, in violation of the statute passed during the late war prohibiting unjust or unreasonable charges in dealing in necessaries. The Court said:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

This principle is again stated by the Supreme Court in the late case of *Home Building & Loan Association vs. Blaisdell,* decided January 8, 1934, 78 Law Ed. 255, as follows:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always

been, and always will be, the subject of close examination under our constitutional system."

It is true that emergency may furnish the occasion for the exercise of a power which already exists under the constitution. This principle is also clearly stated in *Home Building and Loan Association vs. Blaisdell*, supra, where the Court says:

> "While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' Wilson v. New, 243 U. S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented."

The National Government is one of limited powers. Section 8, of Article I of the Constitution defines the legislative powers which are vested in the Congress, and Article X, of the Amendments to the Constitution, provides, "The powers not delegated to the United States

by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

When the validity of an Act of Congress is drawn in question, the Court before sustaining such action, is bound to discover in the Constitution of the United States either an expressed or implied grant of authority to Congress to enact such legislation. When the acts of a Federal Officer are drawn in question, the Court, before sustaining such action, must find not only Constitutional authority to Congress to enact the law, but a legal delegation of authority to the officer who has assumed to act.

In this action the appellees challenge the Constitutionality of the Agricultural Adjustment Act as interpreted by the Secretary of Agriculture in issuing the licenses in question; they challenge the validity of the licenses, upon the grounds that the provisions of the licenses are beyond the power of the Secretary to impose, and beyond the power of the Federal Government, through any agency, to enact as law. The existence of an emergency therefore, does not affect the case.

The constitution does not give to the Federal Government any power to regulate commerce within a State. Emergency cannot confer such power. The Constitution vests all legislative power of the Federal Government in the Congress. Emergency cannot authorize the delegation to a Cabinet officer of the power to make a law. The Constitution authorizes Congress to levy taxes for governmental purposes. Emergency cannot confer upon Congress or the Secretary of Agriculture the power to levy taxes for private purposes. Neither can emergency confer upon the Federal Government the power to violate the amendments to the constitution.

Regulation of Intrastate Commerce Is Beyond the Power of the Federal Government

(1) The Power of the Federal Government Must Be Found Within the Constitution

The Constitution, by what is commonly referred to as the "Commerce Clause," Section 8 thereof, grants to Congress the power "to regulate commerce with foreign nations and among the several states." As the power of the Federal Government is one which must be sustained by the Constitution and one of delegated power from the several states, those powers not delegated being, by the 9th and 10th Amendments, expressly reserved to the respective States or to the people, any law enacted by Congress in that behalf must stand or fall by the test of the so-called "Commerce Clause." In other words, the acts of the Secretary of Agriculture in issuing the Licenses herein complained of must be predicated upon an Act of Congress lawfully passed under this grant of power, and therefore, unless the Licenses as issued by the Secretary are lawful regulations of *interstate* commerce they must fall as not being embraced within the subject of Federal jurisdiction.

U. S. vs. De Witt, 76 U. S. 41:

> "But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested."

Trade-Mark Cases, 100 U. S. 82:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

Hammer vs. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 38 S. C. 529:

> "The control by Commerce over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution . . . The maintenance of authority of the states over matters purely local is as essential to the preservation of all institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal constitution."

The record before the court is plain—none of the plaintiffs are engaged in the business of distributing milk outside of the State of California, or, in fact, outside of a certain portion thereof (Complaint, para. 21, Transcript, page 21), (Supplemental Complaint, para, 35, Transcript, page 89), none of the milk so distributed is produced outside of the State of California, or, in fact, outside of a certain portion thereof, (Complaint, para.

21, Transcript, page 21), (Supplemental Complaint, para. 35, Transcript, page 89), out of the entire milk industry of California only an almost infinitesimal percentage of the milk produced (not distributed) goes outside of the State—less than 1/10th of 1% (Supplemental Complaint, para. 37, Transcript, page 95), and that in the form of manufactured milk products, articles not covered by the license. In fact the affidavits of E. W. Gaumnitz, filed by the defendants and appellants show conclusively that none of the businesses of any attempted licensee are in interstate commerce. (Trans., page 314).

(2) Interstate Commerce Has Been Specifically Defined By the Courts

Coe vs. Errol, 116 U. S. 517, 29 L. Ed. 715:

> "Goods do not cease to be part of the general mass of property in the state, subject as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. * * * Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produced them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of The Daniel Ball, 10 Wall. 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce

in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them to a depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to a depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation, it is no part of the exportation itself."

The Supreme Court in *The County of Mobile vs. Kimball,* 102 U. S. 691, 26 L. Ed. 238, and in *Kidd vs. Pearson,* 128 U. S. 1, 32 L. Ed. 346, gives this definition:

"Commerce with foreign nations and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

In *Hammer v. Dagenhart,* 247 U. S. 251, 62 L. Ed. 1101, the court held the Child Labor Law unconstitutional, saying:

" 'Commerce' consists of intercourse and traffic . . . and includes the transportation of persons and

property, as well as the purchase, sales and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. Delaware L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. Rep. 902.

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. 'When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. * * *'

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

"The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution. * * *

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter

> to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

Howard v. Illinois C. R. Co., 207 U. S. 463; 52 Law Ed. 297:

This case involves the validity of the Employers Liability Act passed by Congress in 1906. The act was held unconstitutional because it embraced all transactions local and interstate of those engaged in interstate commerce and the provisions were not severable.

This opinion is long, but the court states that all the questions which arise concern the nature and extent of the power of Congress to regulate commerce. The following extracts from the opinion as written by Justice White illustrate the points we are making:

> "But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce; that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to

things which are wholly interstate commerce, but embraces those relations as to matters and things domestic in their character, and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the Act.

"From the 1st section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. * * * From this it follows, that the statute deals with all the concerns of the individuals or corporation to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form the statute is addressed to the individuals or corporations who are engaged in interstate commerce business which such persons may do,—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce. * * *

"The Act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subject wholly outside of the power of Congress to regulate commerce. * * *

"As the Act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon the authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the prop-

ositions advanced to show that the statute may be saved.

"On the one hand, while conceding that the act deals with all common carriers who are engaged in interstate commerce because they so engage, and indeed, while moreover conceding that the act was originally drawn for the purpose of reaching all the employees of railroads engaged in interstate commerce to this it is said the act in its original form alone related, it is not yet insisted that the act is within the power of Congress, because one who engages in interstate commerce thereby comes under the power of Congress as to all his business, and may not complain of any regulation which Congress may choose to adopt. These contentions are thus summed up in the brief filed on behalf of the government.

" 'It is the carrier, and not its employees, that the act seeks to regulate, and the carrier is subject to such regulations because it is engaged in interstate commerce. * * *'

" 'By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations.'

"It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution;

in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

In *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 Law Ed. 237, it was contended that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce though they have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. In the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movements from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and

> withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 Law Ed. 931:

Here the Court cites many authorities in support of the proposition that mining is not interstate commerce, but like manufacturing is a local business and that its character in this regard is not affected by the intended use or disposal of the property and persists even though the business be conducted in close connection with interstate commerce.

In *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 76 Law Ed. 1038, the Court held that the generation of electricity in one state for transmission to another state is not interstate commerce, because commerce does not begin until manufacture is finished. "Commerce succeeds to manufacture and is not a part of it."

Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 66 Law Ed. 166:

The Court held that the ginning of cotton is a step in the manufacture of both the seed and the fiber into

useful articles of commerce and that "manufacture" is not commerce; the fact that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce.

> "When the ginning is completed, the operator of the gin is free to purchase the seed or not; and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that state, or to ship it out of the state for use in another; and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the state into interstate commerce and under the national power.
>
> "The application of these conclusions of law to the manufacturing operations of the cotton gins, which we have seen precede but are not a part of interstate commerce, renders it quite impossible to consider them an instrumentality of such commerce."

In *Chassaniol v. Greenwood*, 291 U. S. 584, 78 Law Ed. 662, decided March 12, 1934, the Court says:

> "Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce."

Illinois Central Railroad Co. v. McKendree, 203 U. S. 514; 51 Law Ed. 298:

The Act of Congress in 1903 authorized the Secretary of Agriculture to make quarantine regulations to prevent the spread of diseases in cattle. Claiming to act under this law the Secretary established a quarantine line extending across the State of Tennessee and prohibited the transportation of cattle from points south of this line to points north of this line. In other words, attempted to regulate intrastate commerce as well as interstate commerce. This was Order No. 107. The Court did not decide whether this was an unlawful delegation of legislative authority to the Secretary. It held that the order of the Secretary was void because by its terms it applied as well to *intrastate* traffic as to *interstate* traffic, and said:

> "The terms of Order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that state; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the state of Tennessee. It is urged by the government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the state line, when the state by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within

its terms if the cattle were brought from the south of the line to a point north of the line within the state of Tennessee. It is true the Secretary recites that legislation has been passed by the state of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

The authorities we have thus far cited establish conclusively the following propositions:

1. That the power of Congress to regulate *interstate* commerce is supreme and limited only by other provisions of the Constitution.

2. That neither Congress or any other agency of the Federal Government has any power whatever to regulate commerce which is conducted wholly within a state.

3. That one who engages in a business which is partly interstate and partly intrastate commerce, is subject to Federal regulation as to that part which is interstate,

but does not thereby subject himself to Federal regulations as to that part of his business which is intrastate.

4. That a law of Congress embracing regulations of interstate and intrastate commerce, such regulations being so interblended in the statute that they are incapable of separation, is unconstitutional and void in its entirety.

5. That a business which does not have any interstate transactions is not subject to Federal regulation.

6. That an order of the Secretary of Agriculture which undertakes to provide regulations which upon their face apply to both interstate and intrastate commerce in terms single and indivisible, is unconstitutional and void in its entirety.

(3) The Agricultural Adjustment Act By Its Provisions Does Not Contemplate Interference By Federal Authorities In Intrastate Business.

It is not the contention that the Agricultural Adjustment Act is unconstitutional insofar as the question of interstate commerce is concerned. The Act authorizes the Secretary of Agriculture to issue licenses permitting the handling of commodities "in the current of interstate or foreign commerce." The actions of Congress at the last session are sufficient to show their intention at the time of the passing of the Agricultural Adjustment act to be not to interfere in intrastate business as, indeed, will only a cursory examination of the language of the Act above quoted. The amended Act, Section 8, (3) which *failed to passage* during such session, reads in part as follows:

"Engaging in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof in the current of, or in competition with, or so as to burden, obstruct or in any way affect interstate or foreign commerce."

We therefore contend that the licenses as issued by the Secretary of Agriculture are unconstitutional and void because the Secretary of Agriculture, if the authority so to do is properly delegated to him, has undertaken by his licenses to cover transactions which are not interstate commerce and over which the Federal Government by their acting through Congress or any other agency has no jurisdiction whatever, and over which it is clear indeed that Congress did not intend to give the Secretary any jurisdiction. On this point we can do no better than cite a very recent case of *U. S. vs. Greenwood Dairy Farms, Inc.,* decided in the Southern District of Indiana, Indianapolis Division, by District Judge Baltzell on the 27th day of September, 1934.

(4) By Stating That the Business Affects Interstate Commerce, the Secretary Cannot Make the Same Interstate or Avoid the Application of Established Rulings.

In each of the licenses here involved, the Secretary has attempted to avoid the application of these rules by a recital that he finds the business to be interstate. Thus in License No. 17, issued in November, 1933, it is recited:

"Whereas, the Secretary finds that the marketing of milk for distribution as fluid milk in the Los

> Angeles Sales Area, and the distribution of said fluid milk, are in both the current of interstate commerce and the current of intrastate commerce, which are inextricably intermingled."

It, therefore, becomes necessary to consider this recital in the license and its effect, if any, upon the authority of the Secretary to impose the license in question upon the plaintiffs in this action.

First, we submit that this recital or finding by the Secretary cannot in any way change the facts as they exist nor can the Secretary in this manner convert *intrastate* commerce into *interstate* commerce.

As heretofore pointed out, interstate commerce has been so carefully, definitely defined and so uniformly held not to include production, that the facts in the instant case, read in the light of these rules, clearly preclude the giving of any weight to the Secretary's finding.

Secondly, we submit that License No. 17 did not purport to make any regulation whatever as to interstate commerce.

It is true that in defining what was licensed the Secretary followed the language of the Act and states as follows:

The Secretary of Agriculture,

> "Hereby licenses each and every distributor of fluid milk for consumption in the Los Angeles Sales Area to engage in the handling in the current of interstate or foreign commerce of said fluid milk subject to the following terms and conditions."

In other words each distributor of fluid milk in the Los Angeles Area was licensed to engage in the handl-

ing of fluid milk in interstate commerce, subject to the terms and conditions set out therein. If any distributor did not elect to engage in the handling of fluid milk in interstate commerce, then such distributor did not become a licensee under said license nor subject himself to any of the terms or conditions imposed. And further, so far as the matters now before the Court are concerned, the allegations of the Bill of Complaint must be taken as true, and it is alleged in paragraph XXV,

> "Each of the plaintiffs herein, at all times commencing with November 20, 1933, and extending to and including May 31, 1934, purchased and/or produced all of the milk used by him in the conduct of his business entirely and exclusively within the State of California, and also sold and distributed the milk produced or purchased by him entirely within said state, and none of said milk was produced or moved or shipped outside the State of California. None of the milk produced and/or purchased and/or sold and/or distributed by any one of the four plaintiffs herein, during the period of time commencing with November 20, 1933, and extending to and including May 31, 1934, was in, or ever entered into, the current of interstate and/or foreign commerce, but was and remained at all times entirely within the current of purely intrastate commerce."

So on the face of the purported license and the admitted facts, no one of plaintiffs here was a licensee under that license.

But the real vice in License No. 17 was, that while it purported to license only transactions in interstate com-

merce, all of the terms and conditions which it imposed had reference *only to purely local and intrastate transactions*, and were only applied by the defendants to business of that nature operated by the plaintiffs.

Thus it is provided that as used in the purported license "fluid milk" means milk, cream or any other of the articles listed in Exhibit B *which are sold for consumption in the Los Angeles Sales Area.* In other words, "fluid milk" embraces all of the items to which the license applies, and none of the terms or conditions imposed apply to any items unless it is *sold for consumption* in the Los Angeles Sales Area.

It is next provided that "Grade A. Market Milk" means that portion of fluid milk which is derived from milk produced in the Los Angeles Milk Shed and which is sold for consumption in the Los Angeles Sales Area as fluid milk, other than as fluid cream, and that "Grade A Market Cream" means that portion of fluid milk which is derived from Grade A. milk produced in the Los Angeles Cream Shed and which is sold for consumption in the Los Angeles Sales Area as fluid milk, other than as whole milk. The provisions of the license which it is charged plaintiffs have violated refer only to Grade A. Market Milk or Cream. Therefore, these provisions refer only to milk which is produced in the Los Angeles Milk Shed or Los Angeles Cream Shed and sold for consumption in the Los Angeles Sales Area. The Los Angeles Milk Shed is defined as being entirely within the Counties of Los Angeles, Riverside, San Bernardino and Orange and those dairy farms outside those counties which were producing milk for Grade A. Market Mi'k

on the effective date of the license. The Los Angeles Cream Shed is defined as embracing 10 counties in Southern California and the Los Angeles Sales Area is defined as entirely within the State of California and consisting of Los Angeles, and Orange Counties and portions of Riverside and San Bernardino Counties. Under these definitions none of these provisions of the license would have any application whatever to milk which at any time entered into intrastate commerce.

The purported license then defines "Producer" as meaning any producer or association of producers of milk produced in the Los Angeles Milk Shed and/or the Los Angeles Cream Shed and sold for consumption as fluid milk in the Los Angeles Sales Area; and "Distributor" is defined as meaning persons engaged in the business of handling fluid milk, and "Fluid Milk" is defined as that which is sold for consumption in the Los Angeles Sales Area. None of the terms or conditions of the license applicable to the distributor apply except as to sales for consumption in the Los Angeles Sales Area. On Page 15 of the License it is provided that distributors shall purchase all of their milk requirements of Grade A. Market Milk and Grade A. Market Cream for standardization purposes from producers having established bases in the Los Angeles Milk Shed, and shall purchase all of their milk requirements of Grade A Market Cream from the Grade A Milk producers in the Los Angeles Cream Shed. The prices to be paid to producers, as provided in Exhibit A apply only to Grade A Market Milk delivered F.O.B. distributors' processing plant in Los Angeles or certain other counties in

Southern California. According to paragraph 2, of Article III, the schedule of wholesale, re-sale and retail prices set forth in Exhibit B apply only to fluid milk which shall be distributed and sold by the distributors in the various parts of the Los Angeles Sales Area. Exhibit C, which sets out the rules for control of production, is applicable only to producers of Grade A Market Milk, or as that term is defined, to producers of milk produced in Los Angeles Milk Shed and sold for consumption in the Los Angeles Sales Area. The duties assigned to the Los Angeles Milk Industry Board, created under Exhibit D, are confined to the Los Angeles Market and the Cream Buying Plan set out in Exhibit A applies only to Grade A Milk which is delivered from producers in the Los Angeles Cream Shed.

At no place in this purported license is a single rule prescribed which is applicable to any interstate transactions. The milk to which it applies must be produced within the Los Angeles Milk Shed or within the Los Angeles Cream Shed; it must be delivered to distributors within the Los Angeles Sales Area, and it must be sold for consumption within the Los Angeles Sales Area. Every one of the terms and conditions prescribed by this purported license relates only to such transactions and those transactions are not interstate commerce.

License No. 57, issued May 31, 1934, goes even further in the finding with reference to interstate commerce and recites as follows:

> "The Secretary finds that the marketing of milk for distribution in the Los Angeles Sales Area and the distribution thereof, are entirely in the current

> of interstate commerce, because the said marketing and distribution are partly interstate and partly intrastate commerce and so inextricably intermingled that said interstate commerce portion cannot be effectively regulated or licensed without licensing that portion which is intrastate commerce."

Notwithstanding this recital, the facts as pleaded in paragraph XXVII, of the Bill of Complaint, stand admitted as the matter is now presented to the Court.

The license then proceeds:

> "Now, therefore, the Secretary of Agriculture, acting under the authority vested in him as aforesaid;
>
> "Hereby licenses each and every distributor to engage in the business of distribution, marketing or handling milk or cream as a distributor in the Los Angeles Sales Area, subject to the following terms and conditions."

Thus, it will be seen that the new license does not in any way purport to be applicable to interstate commerce. It licenses the distributors to engage in the business as a distributor in the Los Angeles Sales Area. It does not attempt to prescribe regulations for interstate commerce which may incidently apply to some local transactions. By its very language it excludes all regulations of interstate transactions and makes the terms and conditions apply only to the local transactions. To emphasize this meaning by License No. 57, it is provided in Exhibit A, attached thereto, that any distributor who does *not* sell or distribute whole milk for ultimate consumption in the Los Angeles Sales Area, may purchase

milk from producers who do not have established bases, and "shall not be subject to any of the terms or provisions of this exhibit," except that he shall not sell cream in Los Angeles at a reduced price. In other words, if he buys milk to ship out of the Los Angeles Sales Area, he is not subject to the license.

Thus we have this situation: None of the plaintiffs is or has been engaged in any transaction wherein any of the commodities dealt in by them pass from one state to another; the milk and cream produced by them is produced in the Los Angeles Sales Area; the milk and cream purchased by them is produced and sold to them in the Los Angeles Sales Area; all sales made by them are made in the Los Angeles Sales Area for consumption therein. As to the entire milk industry in the Los Angeles Sales Area, all milk and cream sold therein is produced within the State; all milk and cream produced therein is sold within the State, with the exception that at irregular times and intervals some distributors in said territory, other than these plaintiffs, sell and ship outside of the State of California small quantities of milk and cream after the same has been purchased within said territory and processed and prepared for shipment therein, and that the amount of milk and cream produced within said territory in the State of California which is thus transported outside of the State of California is less than 1/10 of one per cent of the production and is not intermingled with that used therein.

On these facts, can the Secretary of Agriculture convert the business of these plaintiffs into interstate commerce by a recital that he finds the distribution of milk

in the Los Angeles Sales Area to be entirely in the current of interstate commerce because it is partly interstate (less than 1/10 of 1%) and partly intrastate (over 99.9%) and inextricably intermingled, and can the Secretary thus acquire jurisdiction to regulate or prohibit that portion which is purely local and intrastate, without regulating that portion which is interstate? If either of these questions is answered in the negative, then the license must fall. If these two questions are answered in the affirmative, then there is no such thing as local or intrastate commerce, and every commercial activity is subject to regulation or prohibition by the Federal Government. It is probable that no other industry in the State of California is so far removed from interstate commerce as is the distribution of milk and cream in the Los Angeles Sales Area.

In their efforts to sustain these licenses, defendants have submitted the affidavit of E. W. Gaumnitz, in which is recited a large volume of government statistics, relating to dairy products in the United States, all of which, so far as we can see, have no bearing on this case. It shows that in 1933 there was shipped from California to Chicago a small quantity of butter and that a small quantity of cheese was shipped from California to New York and Chicago. It says that ½ or more of the butter received at Los Angeles comes from other states, and a larger percentage of cheese. It shows that *no* milk or *cream* was *shipped out of Los Angeles* during *1931, 1932 or 1933 and that none was brought in from outside territory.* It does show shipments in and out of the state of condensed and dried milk, the only

interstate movements being of manufactured products not covered by either license. (*Neither of which are covered by these licenses.*)

The affidavit argues that "the free flow of manufactured dairy products between different markets in response to price changes engineered by changing supply and demand conditions results in decidedly close correlation between the prices of dairy products in different markets," and that "the prices received by producers for fluid milk testing 3.5 per cent butterfat used for fluid consumption are closely related to the United States average farm price for butterfat."

The argument seems to be that because some commodities which are manufactured from milk or cream are shipped in interstate commerce to and from the State of California, therefore the entire business of producing, distributing and selling milk and cream in the Los Angeles Sales Area becomes "inextricably intermingled" in the "current of interstate commerce," thereby making all such transactions interstate commerce subject to regulation by the Federal Government.

(5) Finding of Secretary That Local Business Is "Inextricably Intermingled" With Interstate Commerce Is Refuted By Facts.

To support this finding the evidence would have to be that the milk produced and purchased and distributed by the plaintiffs, and the prices paid and obtained therefor, directly affected interstate commerce. This, however, is not the fact. The license itself deals with a purely local business of buying and selling milk within

the confines of a small portion of the State of California. As heretofore pointed out, the affidavit of E. W. Gaumnitz was introduced to sustain the appellants' position in this matter. The affidavit speaks for itself, however, and shows a wide gap between the markets of California and elsewhere, abridged only by shipments of a small quantity of butter and cheese. None of the products covered by the license are transported to or from the State of California. Applying the rules laid down by the authorities heretofore set forth as to when interstate commerce starts, it is readily seen that the operations of the plaintiffs, and in fact of all similarly situated in the so-called Los Angeles Sales Area, fall far short of mingling in interstate commerce or having any effect thereon. It will be noticed that this expression "inextricably intermingled" occurs neither in the Constitution nor in the Agricultural Adjustment Act under which is claimed by the appellants the purported license receives its validity.

(6) The Seeking to Justify Control of Intrastate Business Because It Is In the "Current of Interstate Commerce" Is Not Justified.

The expression "current of interstate commerce" does not occur in the constitution, and we submit that the decisions of the Courts do not justify its use in the manner in which it is used in the licenses.

We will refer to some of the cases which have been cited to support this position:

Swift & Co. v. United States, 196 U. S. 375, 49 Law Ed. 518.

The Court says:

"To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the livestock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finnally to get less than lawful rates from the railroads, to the exclusion of competitors. * * *

"One further observation should be made. Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not *accidental, secondary, remote, or merely probable.* On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. * * * Moreover, it is a direct object; it is that for the sale of which the several specific acts and courses of conduct are done and adopted. Therefore, the case is not like United States v. E. C. Knight Co. 156 U. S. 1, 39 Law ed. 325, where the subject matter of the combination was manufacture, and the direct object monopoly of manufacture within a state. However likely monopoly to commerce among the states in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce

among the states in respect to such sales. The two cases are near to each other, as sooner or later must happen where lines are to be drawn, but the line between them is distinct. * * *

"* * * Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. * * *

"The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other states to the stock yards for sale or is brought at those yards for transport to another state."

There the "current of commerce among the states" was a "constantly recurring course" of action by the parties themselves, with the "direct object" of affecting sales in interstate commerce, and the decree was limited to transactions where two states were involved.

Stafford v. Wallace, 258 U. S. 495, 66 Law Ed. 735, involved the validity of the Packers and Stockyards Act, which sought to regulate business done in interstate commerce. The question was whether the stockyards and sales made therein were interstate commerce subject to regulation by the Federal Government.

The Court says:

> "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, *and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another.* Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood

course of business. The stockyards and the sale are necessary factors in the middle of this current of commerce. * * *

"As already noted, the word 'commerce,' when used in the act, is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which, in the judgment of Congress, are likely to affect interstate commerce prejudicially."

The distribution of milk in the Los Angeles Sales Area is not a "throat" through which any current of interstate commerce flows, nor are the transactions therein incident to any current flowing from one state to another.

In *Missouri v. Kansas Co.,* 265 U. S. 298, 68 Law Ed. 1027, the Court held the transportation of gas through pipe lines from one state to another, for sale to distributing companies, in interstate commerce. In the opinion other cases are considered and the point where interstate commerce ceases and intrastate commerce begins is stated, the Court says:

"With the delivery of the gas to the distributing companies, however, the interstate movement ends. *Its subsequent sale and delivery by these companies to their customers are retail is intrastate business and subject to state regulation.* Public Utilities Commission v. Landon, supra, p. 245. *In such case the effect on interstate commerce, if there be any, is indirect and incidental.* But the sale and delivery here is an inseparable part of a transaction in interstate commerce,—not local but essentially national in character,—and enforcement of a selling price in

such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulations upon the final step in the process at the movement the interstate commodity entered the state, and before it had become part of the general mass of property therein. See Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 261, 5 Sup. Ct. Rep. 1091. There is nothing in Pennsylvania Gas Co. v. Public Service Commission, 252, U. S. 23, 64 L. ed. 434, P. U. R. 1920E, 18, 40 Sup. Ct. Rep. 279, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers, which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. Mr. Justice Day, in the course of the opinion, said (p. 31): 'The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.' The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail. The Landon Case, so far as this phase is concerned, differs only in the fact that the process

of division and sale to consumers was carried on, not by the Supply Company, but by independent distributing companies.

"In both cases, the things done were local, and were after the business in its essential national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. *The business of supplying, on demand, local consumers, is a local business,* even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. *In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.* But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different states. The transportation, sale, and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national,—admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned.

Following this decision, it may be said that if a carload of milk were shipped from Nevada to Los Angeles and there sold to a distributor, the interstate transaction would include this sale, but when the purchas-

ing distributor delivered it to his customer, those transactions would be intrastate.

Simpson v. Shepard, 230 U. S. 352; 57 Law ed. 1511, at page 1540. Minnesota Maximum rate case. The Court says:

> "* * *
>
> "The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *This is not to say that the nation may deal with the internal concerns of the state, as such,* but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter."

As we have pointed out, the licenses involved in the case now before the Court, attempt to directly regulate the local business. There is no regulation of interstate transactions which incidentally controls local transactions.

Florida v. United States, 282 U. S. 194, 75 L. ed. 291:

> "* * * The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an *unjust dis-*

crimination against interstate commerce is not open to dispute. * * *

"* * * The property of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power the justification of the exercise of the federal power must clearly appear. * * *

"But to justify the commission in the alteration of intrastate rates, it was not enough for the commission *to merely find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission.* In dealing with unjust discriminationas between persons and localities in relation to interstate commerce the question is one of the relation of rates to each other. * * *"

Board of Trade v. Olsen, 262 U. S. 67 L. ed. 839, at page 848:

"* * * Appellants contend that the decision of this court in Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822, 42 Sup. Ct. Rep. 453, is conclusive against the constituionality of the Grain Futures Act. * * *

"The question is whether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce, in grain. And further are they such an incident of that commerce, and so intermingled with it, that the burden and obstruction caused therein by them can be said to be direct? * * *"

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 398; 55 L. ed. 310:

> "* * * The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transhipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things, and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston, or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation'."

Lemke v. Farmers Grain Co., 258 U. S. 50; 66 L. ed. 458:

Lemke was a grain buyer in North Dakota buying grain for shipment to other states and sought to enjoin the enforcement of the North Dakota Grain, Grading and Inspection Act. This Act, the court says, "Was a comprehensive scheme to regulate the buying of grain."

Under it such purchases could be made only by those holding license from the state, paying state charges for the same and acting under a system of grading, inspecting and weighing fully defined in the act and then subject to the power of the State Grain Inspection to determine the margin of profit which the buyer shall realize upon his purchase. We quote from the opinion:

> "There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his 'spread', or margin of profit. The purchases are generally made with the intention of shipping the grain to Minnneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis, and elsewhere outside the state of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain,—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the state of North Dakota, and it is an unusual thing to get and offer from a point within the state. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal law.
>
> "That such course of dealing constitutes interstate commerce, there can be no question. * * * Being

such the state would not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and Federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defiined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. *It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been delivered to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market.* That was the course of business and fixed and determined the interstate character of the transactions."

Eastern Air Transport v. South Carolina, 285 U. S. 147, 76 Law. Ed. 673.

Suit to enjoin collection of state tax on sale of gasoline for use by airplanes used in interstate commerce:

"Undoubtedly, purchases of goods within a state may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the state upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotive of an interstate carrier, or of the locomotive and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce."

These cases definitely settle that the Federal Government cannot regulate intrastate transactions, except as an incident to the regulation of interstate commerce, and there only when and to the extent that the local transaction is and creates a direct and substantial burden upon interstate commerce. It cannot so act where the effect upon interstate commerce is secondary, accidental or remote. If any effect, no matter how secondary, accidental or remote were sufficient to bestow jurisdiction upon the Federal Government, then all rules heretofore laid down upon the question of interstate commerce would be completely nullified, and the entire business of each and every state then placed under the direct supervision and control of the Federal authorities, depriving the states of their rights heretofore jealously preserved and protected. For once the bars were let down. Production and manu-

facture would be so regulated, whether the same entered into the flow of interstate commerce or not, because who could say what the effect of such production and manufacture would be upon like enterprises in other states, and yet, the only power delegated to the Federal Government is "to regulate commerce with foreign nations *and among the several states* and with the Indian tribels."

If, after the showing made by the plaintiffs herein, any doubt could exist as to whether their businesses are interstate or intrastate commerce, if the transaction takes place within one state, according to the rule laid down in the case of *Arkansas Railroad Commission vs. Chicago Rock Island Pacific Railroad Co.,* 274 U. S. 97, this doubt should be dissolved in favor of intrastate commerce.

(7) The Assumption of Jurisdiction Over Intrastate Business Under the So-called Commerce Clause Leads to Several Other Results Not Contemplated Under This Clause.

The first result immediately apparent is that the license fixes the prices to be paid for milk, and at which milk is to be sold. We can find no authority recognizing a power in Congress to fix prices either of labor or commodities. The case of Wilson vs. New approved such an act, but the force of this decision of course must be limited to the state of facts involved, the court holding there that the power existed and that the emergency then pending awakened the exercise of such power. The case is indeed an extreme one and as no power ever existed in Congress in the Federal Government to deal with intra-

state commerce, no emergency can awaken the exercise of it.

Under the guise of emergency the Federal Government imposes a license upon the sale and distribution of milk, and seeking authority for so doing from the commerce clause of the Constitution, the Federal Government seeks to control the volume of production of milk as a part of its scheme to restore general commodity prices. Under the authority of the cases heretofore stated,

Hamner vs. Dagenhart, supra;
Heisler vs. Thomas Colliery Co., supra,

and others, the control of production is not within the power of the Federal Government.

The purported licenses have the effect, by their price fixing, of stifling competition among the various milk distributors, and putting an end to the individual effort which has always been so jealously safeguarded by the courts of this country, places a premium upon the inefficient conducting of businesses, for it is a matter of common knowledge that some local distributors can conduct their businesses so as to sell their finished product at a lower price than others.

Such interference with the businesses can only be by the hands of local authorities, and then only under the "police power" and for the purpose of regulating the health, morals and welfare of the people. Such police power has never been conferred upon the Federal Government and has never been surrendered by the states, and is in no way contemplated under or by the language of the so-called "commerce clause" of the Constitution under which appellants must justify their acts complained

of herein. Any authorities under Interstate Commerce Commission Acts are not in point which refer to rates to be charged by railroads. Railroads have been constantly declared by the courts to be a public utility charged with a public interest, sharing certain special privileges, and subject to certain limitations. Milk is not and has not been declared to be such a public utility, and until it actually moves in interstate commerce is not an object of interstate commerce. The case of *Nebbia vs. New York,* 291 U. S. 502, is the only authority for the statement that a state in the exercise of its police power may regulate, by price fixing and other means, a large industry common to the state, and the same is in no way applicable to the facts of the instant case.

(8) Holdings of District Courts In Other Parts of the Country.

Appellants seek to justify the very ingenious but fantastic theory that the price paid for milk produced for distribution in the Los Angeles Sales Area and the price at which such milk is so distributed there creates a burden on interstate commerce, affects interstate commerce and affects the national flow of interstate commerce by applying the theories adopted by the courts in sustaining the various anti-trust laws and in holding that the same were valid. A reference to the Agricultural Adjustment Act itself and to the effect the licenses thereunder will have, discloses the fallacy of this attempted application. The Act itself, Part 2, Section 8, Subsection 2 in the following language:

> "The making of any such agreement shall not be held to be in violation of any of the anti-trust laws

> of the United States, and any such agreement shall be deemed to be lawful provided that no such agreement shall remain in force after the termination of this act,"

suspends as to the operation of any of the anti-trust laws.

A reference to one case alone, *Northern Securities Company vs. Un. S.,* 193 U. S. 197, will be sufficient to show the reasoning behind the sustaining of the anti-trust laws and behind the act of Congress in passing the same, that is, to remove any barriers from the free flow of interstate commerce. In other words, to remove anything by way of restraint of trade, price fixing or otherwise, which restricts and tends to stifle competition. The Licenses, however, prevent free competition in the production and sale of milk and set arbitrary prices to be ragidly followed by both the producer and the distributor, and in the instant case that regulation is forced upon a business of a purely intrastate nature contributing nothing whatsoever to the current or flow of interstate commerce.

The theory presented by appellants in the affidavit of E. W. Gaumnitz is indeed an ingenious one. The very earnest way in which the same is presented defeats its very purpose. It is too far fetched to be treated as a rational one, in fact reads as a desperate dying attempt to sustain that which by all rules of law and logic is impossible.

We have heretofore analyzed the cases relied upon by appellants in a presentation of this theory. Again we say that the theory is contradictory to the language expressed

by the licenses. The licenses in their operation deal with whole milk sales only in a small restricted local area covering the purchase of milk to producers within or adjacent to that area, and places no restriction upon prices to be paid for milk to be used in the manufacture or production of other dairy products which may or may not be shipped in or out of the State of California, and it in fact limits rather than assists such a flow of manufactured dairy products, if any there be, from out of the State of California by limiting the production of producers only to the actual needs of the local communities for distribution as fluid milk, and by putting a restriction on the production of excess milk which, in effect, does not limit or in any way restrict the prices of milk which might be produced for the manufacture of dairy products to be shipped, if any were shipped, in the course of interstate commerce.

The appellants' theory that the fixing of minimum prices which distributors must pay producers for milk distributed in the urban markets, such as Los Angeles, and we are dealing here solely with the Los Angeles Sales Area, is essential to the attainment of the exercise of the Federal commerce power and within the commerce power of the Federal Government because throughout the country, if while not in Los Angeles, a great volume of milk moves in interstate commerce, would have the effect of giving absolute authority to the Federal Government of the production, manufacture and sale of every and all commodities, which is contrary to the established rules of law long laid down and set forth in the cases heretofore cited.

Throughout a number of other states the question of the validity of milk licenses issued by the Secretary of Agriculture, under the alleged authorization contained in the Agricultural Adjustment Act, have come before a number of the District Courts. In numerous well written opinions, applying to such licenses and their enactment and to the terms of the Agricultural Adjustment Act purporting to authorize the same, the foregoing and long established principles of law relative to the power of the Federal Government to interfere in intrastate commerce, and the definitions of interstate commerce, the several judges of such districts, after considering and finding the various businesses of the purported licensees to be wholly in interstate commerce upon sets of facts similar or identical with those in the case at bar, have held that the Federal Government has no authority whatsoever to interfere with such intrastate businesses and that any effect such intrastate businesses would have upon interstate commerce would be secondary and remote.

Edgewater Dairy vs. Wallace (Northern Div. of Ill. 6/26/34), 7 Fed. Supp. 121;

U. S. vs. Greenwood Dairy (So. Dist. of Ind. 9/27/34);

Douglas vs. Wallace (Western Dist. of Okla. 10/17/34);

U. S. vs. Neuendorf (So. Dist. of Iowa 11/19/34);

Columbus vs. Wallace (No. Dist. of Ill 11/21/34).

It is interesting to note that apparently from the context of the opinion in several of these cases, an affidavit of E. W. Gaumnitz identical, or almost identical with that in the case at bar, was presented to the court, and

to note the court's comments thereon and also on the government's far fetched theory in each case that the intrastate and local purchase and sale of milk creates a burden upon interstate commerce.

Similar licenses, price restrictions and "Codes" under the National Industrial Relief Act, have also been before the courts and under these Federal Government interference with purely intrastate commerce has been held to be void, and the matter of intrastate commerce has been held not one of authority for the Federal Government, notwithstanding the language of the various Codes and of the N.R.A. Some of these cases are

U. S. vs. Suburban Motor Service Corp. (No. Dist. of Ill. 2/10/34) 5 Fed. Sup. 798;

U. S. vs. Licto (No. Dist. of Texas, 2/16/34) 6 Fed. Sup. 32;

Hart Coal Co. vs. Sparks (Western Dist. of Ky. 5/19/34) 7 Fed. Supp. 16;

Amazon Petroleum v. Ryan (5th Cir. 5/22/34) 71 Fed. 2d. 1;

U. S. v. Mills (Md. 7/12/34) 7 Fed. Supp. 547;

Irma Hat Co. vs. Code (No. Dist. of Ill. 7/31/34) 7 Fed. Supp. 687;

U. S. vs. Gerhart (Colo. 8/8/34);

U. S. vs. Koslend (Eastern Dist. of Mich. 9/5/34;

U. S. vs. Eason Oil Co. (Western Dist. of Okla 9/22/34);

Miss. Hardwood Co. vs. McClanda (Western Dist. of Miss. 10/6/34);

U. S. vs. Belcher (No. Dist. of Ala. 10/31/34);

Carter Kelley Lbr. Co. vs. U. S. (Texas 12/8/34; (in which no opinion was written but a permanent injunction granted)

The very able opinions written in the above entitled cases, while of course not conclusive upon this court, being from courts of inferior jurisdictions, however in our opinion enunciate the guiding principles of law determining the question now before this court, and can lead to but one conclusion, that is, that the District Court Judge granting the preliminary injunction on the grounds set forth in his opinion was correct.

From the authorities we conclude:

1. If milk were shipped from Los Angeles to another state, interstate commerce would not begin until after the milk had been produced, processed and prepared ready for shipment.

2. If milk were shipped from another state to Los Angeles, interstate commerce would cease as soon as it was delivered and came to rest at its destination.

No Court has ever ruled:

1. That an industry as a whole becomes interstate commerce, simply because some of these engaged in it may have interstate transactions.

2. That one who has no transactions in interstate commerce, becomes subject to Federal regulation because some one else in the same industry conducts an interstate business.

3. That the Federal Government, under the guise of regulating interstate commerce, can control production, manufacture or local distribution of any commodity.

The Deductions, Taxes, Charges and Excises Provided In the Licenses Are Not Authorized by the Agricultural Adjustment Act, and Are Unconstitutional.

The license imposes a tax assessed by the Secretary of Agriculture to be collected by an association of individuals, a private corporation or an appointee of the Secretary of Agriculture against the strict provisions of the Agricultural Adjustment Act. Section 9 of the *Agricultural Adjustment Act* provides:

> "(a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. * * * The processing tax shall be levied, assessed and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor."

Section 12 of the *Act* provides as follows:

> "(a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.
>
> "(b) In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the fol-

lowing purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection."

Section 19 of the *Act* provides:

"(a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States."

Declaration of Policy of the *Agricultural Adjustment Act,* paragraph 2:

"It is hereby declared to be the policy of Congress—

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

Nowhere in the Act is there any provision that is contrary to the Declaration of Policy, which by its plain

terms shows the intention of Congress to increase the purchasing power of farmers, and nowhere in the Act is there any provision providing for the payment of any expense, fee, tax by producers (farmers) of agricultural commodities. In the face of this, however, License No. 17, in Article III, paragraph 4 (b), to and including paragraph 5 (c) thereof, imposes charges, expenses or taxes upon producers of agricultural commodities against the express terms of the Agricultural Adjustment Act. These expenses, charges or taxes under the provision of said License No. 17, are to be fixed and determined by the Los Angeles Milk Industry Board, an association of individuals, and by Producers Arbitration Committee, Inc., whose name was thereafter changed to Milk Producers, Inc., and which sums are, under the terms of the License, to be collected by such association of individuals known as Los Angeles Milk Industry Board and Milk Producers, Inc., a corporation organized and existing under and by virtue of the laws of the State of California.

As heretofore pointed out, the provisions of the Agricultural Adjustment Act are plain in their terms (Section 19):

> "The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States."

Plainly, from the terms of the Agricultural Adjustment Act, the only tax that can be imposed is a pro-

cessing tax to be paid by the processor at the first processing of the commodity.

License No. 57 provides for similar charges to be assessed and collected through the operation of an adjustment account maintained by the Market Administrator, as provided in Exhibit A of such License.

Manifestly, therefore, the Licenses and each of them, are issued directly in violation of the plain terms of the Agricultural Adjustment Act and contrary to the Declaration of Policy by Congress, for the following reasons:

1. The Agricultural Adjustment Act by its terms provides for no payment by, or deduction from, a producer (farmer).

2. The Agricultural Adjustment Act by its terms provides for the payment of expenses of administration of the Act out of the Congressional appropriation (Section 12) of $100,000,000, and does not provide for any payment of expenses by any portion of the agricultural industry.

3. No processing tax has been fixed or levied by the Secretary of Agriculture, and no other tax is provided for by the Agricultural Adjustment Act.

4. The excise tax attempted to be levied by the Licenses is not provided for by the Agricultural Adjustment Act.

5, The excise tax attempted to be levied by the Licenses is not payable to the Collector of Internal Revenue of the United States nor paid into the treasury of the United States, as provided by Section 19 of the Act.

6. The taxes, excises or charges attempted to be levied by the Licenses are not uniform in their method of collection.

7. The taxes, excises or charges attempted to be levied by the Licenses are not uniform throughout the United States.

8. That such taxes, excises or charges attempted to be levied and collected under the provisions of such Licenses are prohibited by and in contravention of Article I, Section 8, Clause 1 of the Constitution of the United States, in the following particulars:

(a) That such taxes, excises or charges are not to pay the debts or to provide for the common defense and general welfare of the United States.

(b) That such taxes, excises or charges are not uniform throughout the United States, but by the provisions of the Licenses and each of them, are only applicable to a small part of the State of California and are only attempted to be levied and collected wholly within a part of the State of California.

The Supreme Court in the case of *City of Los Angeles v. Lewis,* 175 Cal. 777, said:

> "A legislative act authorizing taxation for a private purpose is unconstitutional, as under our system of government taxes can be laid only for a public object."

Taxes are of two kinds—direct and indirect. Under the Constitution, direct taxes are apportioned among the several states, and indirect, such as duties, posts and excises, must be uniformly applied under the Constitu-

tion, and shall operate precisely in the same manner upon all individuals. See *Knowlton v. Moore,* 178 U. S. 47, 83, 84, 86, 88.

The Supreme Court in *Patton v. Brady,* 184 U. S. commencing at page 617, defines the term "excise" as applied to taxes, and at page 622, said:

> "* * * the Constitution, art. 1, sec. 8, provides that 'all duties, imposts and excises shall be uniform throughout the United States.' The exercise of the power is, therefore, limited by the rule of uniformity. The framers of the Constitution, the people who adopted it, thought that limitation sufficient, and courts may not add thereto. That uniformity has been adjudged to be a geographical uniformity."

In *Bromley v. McCaughn,* 280 U. S., at page 138, the Court again said:

> "The uniformity of taxation throughout the United States enjoined by Article I, paragraph 8, is geographic, not intrinsic."

How then can this excise be one not prohibited under Article I, paragraph 8, of the Constitution, when this tax is attempted to be applied within a small portion of the State of California? This Court will take judicial notice that these same commodities, to-wit, milk and cream, are produced throughout the United States.

These taxes, charges or excises are further repugnant to the due process clauses of the Fifth and Fourteenth Amendments to the Constitution, in that they are not affected with a public interest. In *Tyson v. Banton,* 273 U. S. 418, the Court said: (At page 429.)

"* * * the real inquiry is whether every public exhibition, game, contest or performance, to which an admission charge is made, is clothed with a public interest, so as to authorize a lawmaking body to fix the maximum amount of the charge, which its patrons may be required to pay.

"In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, Case of the State Freight Tax, 15 Wall. 232, 278, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. See City of Carrollton v. Baxxette, 159 Ill. 284, 294. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all."

At page 430:

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.'

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such

as arises from the mere fact that the public derives benefit, accomodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right', that synonym more nearly than any other expresses the sense in which it is to be understood."

At page 431:

"And finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry. Wolff Co. v. Industrial Court, 262 U. S. 522, 536."

The Attempt by the Secretary of Agriculture to Forfeit the Alleged License #57 as to Appellees For Alleged Violations of License #17, Is In Effect an Attempt to Prosecute Appellees Under an Ex Post Facto Law.

In *Thompson v. Utah*, 170 U. S. 343, at page 351, the Court said:

"It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of ex post facto laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' United States v. Hall, 2 Wash. C. C. 366; Kring v. Missouri, 107 U. S. 221, 228; Medley, Petitioner, 134 U. S. 160, 171."

In *Duncan v. State of Missouri,* 152 U. S., at page 377, the Court said: (Page 382.)

> "It may be said, generally speaking, that an ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; Cummings v. Missouri, 4 Wall. 277; Kring v. Missouri, 107 U. S. 221."

License No. 57 was promulgated by the Secretary of Agriculture to become effective on the 1st day of June, 1934, and as set forth in the Bill of Complaint herein, all violations alleged against the plaintiff concerning License No. 17 are charged to have occurred long prior to such date. The proposition of law is too simple to take up the time of this Court in a further or extended argument on this point.

Paragraph (3) of Section 8, of the Agricultural Adjustment Act Is Unconstitutional Because It Delegates Legislative Authority to the Secretary of Agriculture.

The Agricultural Adjustment Act provides: "In order to effectuate the declared policy, the Secretary of Agriculture shall have power:

> "(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign

commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof."

The declared policy is stated in Section 2 of the Act, as follows:

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the pre-war period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.

"(2) To approach such equality of purchasing power by gradual correction of the present inequalities at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

"(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products

> derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914."

From a reading of these provisions, five things stand out:

(1) The Act purports to give to the Secretary the power to issue licenses whereby he fixes such terms and conditions for the conduct of the business licensed as in his judgment will eliminate unfair practices or charges that prevent or tend to prevent the establishing and maintaining of such balance between production and consumption as will reestablish prices to farmers;

(2) It entirely fails to set up any standard of unfair practices or charges to operate as a guide to or limitation upon the power of the Secretary;

(3) It entirely fails to indicate the nature of any means to be adopted by the Secretary to protect the effectuation of the declared policy;

(4) It entirely fails to define any act or the nature or character of any act which it intends to make unlawful;

(5) It authorizes the Secretary to prescribe the rules for conducting the business licensed—to make the law which is applicable to such business.

Section 1, of Article I of the *Constitution of the United States* provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

In *United States vs. Eaton,* 144 U. S. 677; 36 Law Ed. 591, the Court says:

> "It was said by this Court in Morrill vs. Jones, 106 U. S. 466, that the Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carrying into effect what Congress has enacted. * * *
>
> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle law that an offense which may be the subject of criminal procedure is an act committed, or omitted, 'in violation of the public law, either forbidding or commanding it.' "

In *Field v. Clark,* 143 U. S. 649; 36 Law Ed. 294, p. 310, the Court says:

> "*That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.* The Act of October 1st, 1890, in the particular under consideration, is not inconsistent with that principle. It does not in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the Act of October 1st, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reci-

procally equal and reasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency and that in case of such suspension certain duties should be imposed."

In the case last cited, the Court quotes approvingly from *Lock's Appeal*, 72 Pa. 491, as follows:

> "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some facts or state of things upon which the law makes, or intends to make, its own action depend."

It also quotes approvingly the following language from *Cincinnati Co. vs. Clinton County Commissioners,* 1 Ohio St. 88:

> "The true distinction is between the delegation of power to make the law which necessarily involves a discussion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

We do not question that Congress may authorize an administrative officer to make regulations for the purpose of supplying administrative details in carrying a law into effect. But Congress cannot delegate the authority to make the law—that is, to prescribe the rule of conduct.

The rule is well stated in *Wichita Railroad & L. Co. v. Public Utilities Commission,* 260 U. S. 48, 67 Law Ed. 46, as follows:

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter, qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

The Act here in question does not enjoin upon the Secretary any course of procedure nor does it prescribe any rules of decision in the performance of his functions.

The following cases illustrate the difference between administrative regulation and legislation:

U. S. v. Verde Copper Co., 195 U. S. 207; 49 Law Ed. 449:

The Act of Congress granted permission to fell and remove timber on public lands for "building, agricultural, mining, and other domestic purposes," and provided that the felling and use of timber shall be, "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth upon such lands, and for other purposes." No. 7 of the Regulations promulgated by the Secretary provided, "no timber is permitted to be used for smelting purposes." The Court says:

> "But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authorization and final construction to the statute. This, we think, is beyond his power. * * * If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. *Such power is not regulation; it is legislation.*"

Morrill v. Jones, 106 U. S. 466; 27 Law Ed. 267:

The Revenue Law provided that animals for breeding purposes should be admitted free of duty upon proof thereof, satisfactory to the Secretary of the Treasury, and under such regulations as he might prescribe. The

Treasury regulations provided that before such animals were admitted free, the Secretary must be satisfied that the animals are of superior stock, adapted to improving the breed in the United States. We quote from the opinion:

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of "superior stock." This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

Southern Pacific Co. v. Interstate Commerce Com., 219 U. S. 433; 55 Law Ed. 283:

> "Applying these propositions, the insistence is that, both in form and in substance, the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of

upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so. * * *

"Coming to the consideration of that subject we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

In *Ex Parte Cox*, 63 Cal. 21, the Court says:

"The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor. The legislative power of the state is vested in the Senate and Assembly. That power could not, as to the case before us, be delegated to the officer or board. The act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the officer and board the power to so declare."

Dougherty v. Austin, 94 Cal. 601, we quote, commencing on page 605:

> "The question is thus squarely presented whether it was competent for the legislature thus to delegate to the board of supervisors of that county the power to change or suspend that part of the general law fixing the salaries of county officers, which provided that the county clerk of Marin County should himself pay the deputy or deputies employed by him. There can be, under well-settled principles of constitutional law, but one answer to this question, and that is one which denies to the legislature any right to thus delegate to any other body or tribunal what is most clearly a legislative power, the exercise of which the constitution has confided to that department of the state alone. This principle is one so universally accepted as true, that Judge Cooley, in his work on constitutional limitations, states it as a maxim of constitutional law. He says: 'One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.' (Cooley on Constitutional Limitations, p. 117)."

Schaezlein v. Cabanuss, 135 Cal. 466; on page 469, it is said:

> "It is no invasion of the right of the employer freely to contract with his employee, to provide by general law that all employers shall furnish a reasonably safe place and reasonably wholesome surroundings for their employees. The difficulty with the present law, however, is, that it does not provide, but that it is an attempt to confer upon a single person the right arbitrarily to determine not only that the sanitary condition of a workshop or factory is not reasonably good, but to say whether, even if reasonably good, in his judgment, its condition could be improved by the use of such appliances as he may designate, and then to make a penal offense of the failure to install such appliances. 'The very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' (Yick Wo v. Hopkins, 118 U. S. 356.)"

In *Englebretson v. Industrial Accident Commission,* 170 Cal. 793, it was held that the power given by the constitution and by the act of the legislature to the Industrial Accident Commission "to regulate and prescribe the nature and extent of the proofs and evidence" does not authorize the Commission to act on hearsay testimony. The Court says, at page 797:

> "It is obvious that if this section would have the effect to confer upon the commission power to enact laws prescribing the nature and extent of proof necessary to make out a case, it would be a delegation

to the commission of the powers of the legislature to that respect. No authority for such delegation of power is given by Section 21 of Article XX of the constitution, in pursuance of which the Workmen's Compensation Law was enacted, and which constitutes the only authority for the provision authorizing such matters to be determined by the commission instead of by the courts. Being an improper delegation of authority, the aforesaid provision of subdivision 6 is wholly unauthorized and would have no effect, even if the commission had acted on it. It is not shown that the commission has made any order or rule declaring the nature and extent of the proofs and evidence required in cases under the law.

"The main reliance is upon the provision that the commission should not be bound 'by the technical rules of evidence,' and upon the general effect of the act in prescribing an informal and expeditious method of procedure. We cannot agree to the proposition that the rule against the admission of hearsay evidence as proof of a fact is a mere technical rule of evidence."

In re Peppers, 189 Cal. 682, the Court says, at page 688:

"It is our conclusion that the legislature had no power to thus delegate to an administrative board or officer its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful."

The authority to the Secretary of Agriculture to issue licenses subject to such terms and conditions as may be necessary to eliminate unfair practices or charges that prevent, or tend to prevent, the effectuation of the

declared policy and the restoration of normal economic conditions in the marketing of such commodities and the financing thereof, is an attempt to confer upon the Secretary purely legislative powers. It attempts to authorize the Secretary to determine what terms and what conditions are necessary to eliminate unfair practices or charges that prevent or tend to prevent the restoration of economic conditions. It substitutes the judgment of the Secretary upon this very disputed subject matter for the judgment of Congress.

It attempts to authorize the Secretary to determine what are "unfair practices or charges;" what laws are necessary to eliminate the same; what are "normal economic conditions," and what acts prevent or tend to prevent the restoration of such conditions. It authorizes the Secretary to say what acts shall be lawful and what acts shall be unlawful. That is legislation.

Not only does this language attempt to confer upon the Secretary of Agriculture legislative powers in violations of the Constitution, but the language is so uncertain and indefinite as to make it impossible of enforcement.

United States v. Cohen Grocery Co., 255 U. S. 81; 65 Law Ed. 516.

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constitute a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation

against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the Court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalize and punish all acts detrimental to the public interest when unjust and unreasonable in the estimation of the Court and jury.

"That it results from the consideration which we have stated that the section before us was void for repugnancy to the constitution is not open to question."

Cline v. Frink Dairy Co. 274 U. S. 445; 71 Law Ed. 1146:

"The anti-trust law of Colorado was held unconstitutional because it violated the Fifth Amendment. Inasmuch as it contained provisions that no agreement shall be deemed unlawful, the basis and purposes of which, are to conduct operations at a reasonable profit or to market at a reasonable profit those products that cannot be otherwise so marketed. 'When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detail restriction

of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impractical standard for the jury's decision.

"A Legislature must fix a standard more simply and more definitely before a person must conform or a jury can act."

Applying the language of these cases, we may say, in regard to the particular provision of the Agricultural Adjustment Act, herein involved, that the Act, by its terms, merely penalizes and punishes all acts which in the estimation of the Secretary of Agriculture constitute unfair practices or charges and which in his judgment tend to prevent the restoration of what he may deem to be normal economic conditions. Can there be any doubt that the determination of these questions by the Secretary *is legislation by him?*

Each License Is Void Because the Secretary Thereby Undertakes to Exercise Legislative Authority.

Each of the Licenses involved in this litigation undertakes to enact the law under which the business of producing and distributing milk in the Los Angeles Sales Area may be conducted. If the Act confers upon the Secretary the power to enact such laws (and the Secretary has definitely placed that construction upon it), then, as we have seen, that part of the act is unconstitutional; if the Act should not be construed as delegating such legislative power to the Secretary, then the Secretary has undertaken to enact laws without even a delegation of power. In either view of the case the

licenses are void, because the Secretary has thereby undertaken to legislate.

We will consider some of the particulars wherein the Secretary, by these licenses, has deemed to exercise legislative functions—

(1) By paragraph D, of Article I of License No. 17, there is created a district known as "Los Angeles Sales Area" and the boundaries thereof are defined, and Article III makes the license applicable only to distributors "of fluid milk for consumption in the Los Angeles Sales Area;" by paragraph E, of Article I another district, known as "Los Angeles Cream Shed" is created and its boundaries defined, and by paragraph F another district, known as "Los Angeles Milk Shed" is created and its boundaries defined. Paragraph C, of Article I of License No. 57 also creates a district known as "Los Angeles Sales Area" and defines its boundaries and that license is made applicable only to those who distribute, market or handle "milk or cream as a distributor in the Los Angeles Sales Area."

The creation of districts of the kinds here mentioned are purely legislative acts.

People v. Parks, 58 Cal. 624-643, we quote from the opinion:

> "To declare a public purpose, and to create a district over a designated area of the State, in which that purpose shall be accomplished, and to provide ways and means for its accomplishment, *are matters which belong exclusively to the Legislature.* If a necessity exists for the construction of public improvements within the State for a public purpose,

> the Legislature must declare it. *If a district has to be created over an area of the State the Legislature must create it, and establish its limits.* If property within it will be benefited by the improvement, the Legislature must determine it, and prescribe the rules upon which taxation must be apportioned. There are powers conferred upon it alone by the Constitution, and it cannot delegate them to any other department of the government, or to any agency of its appointment, *because it would be confiding to others that legislative discretion which legislators are bound to exercise themselves, and which they cannot delegate to any other man or men to be exercised."*

Judge E. M. Ross, then a member of the Court, in a concurring opinion, said:

> "The establishment of such districts is a legislative function, to be exercised by a legislative body; and the Legislature is expressly prohibited by the Constitution of the State from clothing any of its *executive* officers with such power."

(2) Paragraph 1 of the terms and conditions set out in Article III of License No. 17 provides that "The schedules giving the prices at which the terms and conditions under which milk shall be purchased by distributors for distribution as fluid milk shall be those set forth in Exhibit A, which is attached hereto and made a part hereof. Exhibit A fixes the price to be paid to producers. Paragraph 2 of the same article provides that the wholesale and retail prices at which fluid milk shall be distributed and sold in the various parts of the Los Angeles Sales Area shall be those set forth in Exhibit B. Exhibit B contains many schedules for fixing

different selling prices for different territorial areas within the Los Angeles Sales Area.

These price-fixing provisions are clearly legislative acts. Not only is this true, but they are entirely beyond the purview of the Act. *At no place in the Act is there any language to indicate an intention to attempt to confer upon the Secretary of Agriculture the power to fix the price at which the producer may sell his agricultural product* to the distributor, or the price at which the distributor may sell such product to the consumer. They are purely *attempts* by the *Secretary to enact laws without any semblance of a grant of authority,* whether such grant be valid or invalid.

(3) Paragraph 1 of Article II of License No. 57, provides that the prices and the terms and conditions under which distributors shall purchase milk from producers shall be those set forth in Exhibit A. Exhibit A sets out an elaborate marketing plan which fixes the price to be paid to producers and covers many other subjects. Said paragraph 1 also provides that any contract or agreement entered into between any distributor and producer prior to the effective date of this license, covering the purchase of milk shall be superseded by the terms of the license. Paragraph 2 of said Article II also provides that no distributor shall purchase milk from producers except those having bases as provided in Exhibit A; it also fixes the minimum prices and terms under which milk and cream may be sold by distributors as set forth in Exhibit C, and contains a similar provision abrogating contracts between distributors and any person for the sale or delivery of milk or cream.

Here the Secretary assumes to enact a law fixing the prices at which business may be done defining and limiting producers with whom the distributor may deal and abrogates contracts previously made with producers or with consumers. Will any one maintain that such provisions are not legislation? The Act does not assume to authorize such legislation by the Secretary. There is nothing in the Act which indicates an intention to authorize the Secretary to abrogate existing contracts.

(4) Paragraph 3 of Article III of License No. 17, provides that every distributor shall purchase and distribute milk in accordance with the production and control plan set forth in Exhibit C attached to the license. Exhibit C fixes a "production base period" and defines it as the period March 6, 1933 to June 15, 1933—about six months previous to the effective date of the license. It provides for a "market percentage" to be arrived at "by dividing the daily average of the total deliveries of all producers who shipped milk during the production base period into the daily average quantity of milk sold for consumption as whole milk in the Los Angeles Sales Area during the month of June, 1933," and establishes a base for each producer who was marketing milk during the base period which is to be arrived at by taking his average daily deliveries during the production base period and applying the market percentage thereto. The resulting figure to be his established base. Producers who went into business after March 16 or before June 15, 1933, are to have their bases fixed at approximately one-half of their production; producers starting business after June 16, 1933, have their bases fixed at approximately one-quarter of their production.

Exhibit B of License No. 57 continues the allotment of bases. The provisions of both licenses are lengthly and complicated, but the net result is that a producer is to be paid one price for what is denominated his "base milk" and a lower price for milk delivered in excess of his base. The price to be paid for each class of milk is to be determined under License No. 17 by the Los Angeles Milk Industry Board and Milk Producers, Inc.; under License No. 57, it is to be determined by the Market Administrator. These provisions are all legislative. If Congress had undertaken to authorize the Secretary to promulgate these rules, that would have amounted to a delegation of legislative authority, but the Act does not contain any such provision. It does, in paragraph 1 of Section 8, authorize the Secretary to provide for reduction in production for market of any basic agricultural commodity *through agreements with producers* or *by other voluntary methods,* and to provide for *rental* or *benefit payments* in *connection therewith* in such amounts as the Secretary deems fair and reasonable to be paid out of any monies available for such payments. At no place in the Act is the Secretary authorized to enact legislation which deprives the producer of the right to market his product nor does it say that the producer must accept the greatly reduced price for his product simply because he did not happen to be marketing the same quantity of that product at a time six months before the Secretary acted. These provisions cannot be viewed in any light, except that the Secretary has undertaken to legislate and that therefore his acts are void.

(5) License No. 17, in Exhibit B, attached thereto, creates the Los Angeles Milk Industry Board. The license makes this board and Milk Producers, Inc., a private California corporation, the agencies for carrying out the provisions of the license. License No. 57 creates the office of Market Administrator, and in Section E of Exhibit A prescribes his duties and compensation. He is required to furnish an official bond contingent upon the faithful performance of his duties as such Market Administrator.

The creation of offices and the assignment of their compensation is a legislative function.

> *Cochnower v. U. S.*, 248 U. S. 405; 63 Law Ed. 328;
> *Glavey v. U. S.*, 182 U. S. 595; 45 Law Ed. 1247.

(6) Subdivision B of paragraph 4 of Article III of License No. 17 provides for a deduction of ¼ cent per pound of butterfat from the price paid to the producer, this sum to be paid to Los Angeles Milk Industry Board; Subdivision 5 of the same article requires a deduction from the price paid to the producer of milk (1) for deliveries in excess of the part classified as "base milk" a sum equal to the difference between the base price and the surplus price, and (2) for that part not in excess of the producers' bases the difference between the base price and the adjusted base price. Said sums to be paid to Milk Producers, Inc., for the purpose of equitably allocating the loss involved in handling surplus milk." And by Subdivision C of the same paragraph, every distributor having production of his own is required to make similar payments.

In making these provisions the Secretary assumes to legislate. He assumes to legislate not only without any attempt by Congress to delegate that power of legislation, but contrary to the provisions of the Act. He attempts to impose upon the producer the burden of the loss from handling surplus production. *At no place does the Act indicate an intention of Congress to impose such a burden upon the producers.* On the contrary, paragraph 1 of Section 8 provides for the reduction in production by rental or benefit payments "to be paid out of any monies available for such payments." This clearly indicates that where such payments are made they are to be made by the Government. Section 9 of the Act provides for processing taxes and that they "shall be paid by the processor." The attempt of the Secretary to pass this burden on to the producer is a void effort to legislate without any authority.

(7) Sublivision C of paragraph 4 of Article III of License No. 17 provides, that all producers who are not members of seven cooperative organizations named therein shall pay to the Milk Producers, Inc., an amount for each pound of butterfat equal to the average amount which the member of such associations are then authorizing the distributors to pay over to such associations on behalf of their respective members. This also is legislation by the Secretary and without any authority in the Act.

(8) Paragraphs 4 and 5, of Article III of License No. 17 provides as to each subdivision thereof, that distributors shall not purchase milk from producers unless such producers authorized the distributor to deduct from

the payment due to the producer and pay over as therein provided the amounts therein called for. *In other words, the Secretary of Agriculture enacted a law which deprives the producer of the right to sell his product unless he authorized a deduction from the purchase price of various sums determined according to a law enacted by the Secretary of Agriculture.* Upon no theory can it be said that such requirements are not attempts at legislation.

These things stand out particularly as showing the extent to which the Secretary of Agriculture has gone in his assumption to exercise legislative authority. Every part of each of the licenses is subject to this objection. No provision contained in either license can be justified as an administrative regulation under proper authority of law.

Paragraph (3), of Section 8, of the Act Is Unconstitutional Because It Confers Judicial Power Upon the Secretary of Agriculture.

After authorizing the Secretary to issue licenses, Paragraph 3 of Section 8, reads:

> "The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this Section shall be subject to a fine of not more than $1,000 for each day during which the violation continues."

Milk Regulations, Series 1, published by the Secretary July 22, 1933, in Section 203, (lines 26 to 31, page 7, of Complaint) provide:

> "Any license issued hereunder may be suspended or revoked with respect to any distributor for violation of the terms or conditions thereof by such distributor or by any of his officers, employees, or agents. The procedure for suspension or revocation proceedings shall be in accordance with General Regulations, Agricultural Adjustment Administration, Series 3."

Article II, of General Regulations, Series 3, containing these provisions, is set out in the Bill of Complaint at pages 9, 10, 11 and 12. Thus it will be seen that the law authorizes the Secretary to suspend or revoke any license, after due notice and opportunity for hearing, and makes the penalty applicable to any one who continues in business after such revocation. The determination of one's right to do business and making him liable to severe penalty, is a judicial act.

Section 1, Article III, of the *Federal Constitution* provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior."

Neither the Secretary of Agriculture nor the hearing officer appointed by him, is a judge holding office during good behavior, nor does either constitute a court

ordained or established by Congress. They are executive officers of the Government and it is contrary to the whole scheme of the Constitution that such judicial authority should be vested in them.

The language of the Supreme Court in *Ex Parte Milligan,* 4 Wall. 2, 18 Law Ed. 281, is particularly applicable here. It is there said:

> "Every trial involves the exercise of judicial power; and from what source did the Military Commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vested it 'in one Supreme Court and such inferior courts, as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'"
>
> "But it is said that the jurisdiction is complete under the 'laws and usages of war'."
>
> "It can serve no useful purpose to inquire what those laws and usages are, when they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usages of

> war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our National Legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."

In the present case we have this situation: It is claimed that the license has the force of law. All of the terms and conditions therein set out are prescribed by the Secretary. Not a single one of them is even suggested in the Act. If these terms and conditions have the force of law, that law was made by the Secretary of Agriculture.

Appellees were charged only with violating the law thus made by the Secretary and were placed on trial to determine their right to continue in business—the most valuable property right they possess—on a charge made by the Secretary and which starts out with the statement that the Secretary has reason to believe that they are guilty. (Exhibits 3, 5, 6, 8, 9, 11, 12 and 14, Bill of Complaints.)

Appellees were placed on trial before a hearing officer who is an officer or employee of the Department of the Secretary of Agriculture, designated by the Secretary for that purpose. The Secretary appears as a party to the proceeding and as the prosecutor, and as such is represented by his counsel.

Thus it is apparent that the Secretary of Agriculture makes the law; the Secretary of Agriculture is the complaining witness who makes the charge of violation of the law; the Secretary of Agriculture is the tribunal who proposes to try the issues of guilt or innocence and to interpret the law he has made, and the Secretary of Agriculture is the prosecutor who prosecutes the case before himself. Yet it will doubtless be argued in this case that such a travesty on justice is permitted by the Constitution of the United States. If such procedure is permitted by the Constitution, why did the framers of the Constitution provide for a Congress to make the laws? If such procedure is permitted by the Constitution, why did the framers of the Constitution provide for Courts to be established to exercise the judicial powers of the Government? Wherein is such procedure consistent with liberty? Wherein does such procedure differ from tyranny? Will anyone contend that these plaintiffs can have a fair trial before such a tribunal?

The despotic situation just outlined is due to the fact that paragraph (3), of Section 8, of the Act, attempts to confer upon the Secretary of Agriculture both legislative and judicial powers, contrary to the provisions of the Constitution.

The License Constitutes an Unlawful Interference With the Right of Plaintiffs to Contract.

The License No. 17 provides that Exhibit "A" shall govern the prices at which, and the terms and conditions under which, milk shall be purchased by distributors. Exhibit "A" contains many specifications of prices and

terms and conditions governing the purchase of milk by distributors.

Subdivision (b) of paragraph 4, Article III, provides that distributors shall not purchase milk from any producer unless the producer authorizes the purchasing distributor to pay up to ¼ cent a pound butter fat to the Los Angeles Milk Industry Board; Subdivision (c) prohibits distributors from purchasing milk from any producer who does not agree that there may be deducted from his price and paid to the Los Angeles Board a sum to offset dues paid by the cooperative organizations; Subdivision (a) of paragraph 5 prohibits the purchase of milk from any producer who does not agree to the surplus deductions, and exhibit "B" prohibits sales unless made at the prices and on the terms and conditions therein stated.

License No. 57 prohibits the distributor from purchasing milk from a producer, unless the producer authorizes all deductions and regulations provided in Exhibit A; it fixes prices to be paid for milk and minimum selling prices.

Thus, it is apparent, that the freedom of any distributor to contract for the purchase of milk from a producer or to contract for the sale of the product to others is so limited that the right of contract is entirely destroyed.

Tyson & Bro. vs. Banton, 273 U. S. 429; 71 Law Ed. 718:

> "The right of the owner to fix the price at which his property shall be sold or used is an inherent

attribute of the property itself, and as such within the protection of the due processes of law clauses of the 5th and 14th amendments."

Fairmount Creamery Co. vs. Minnesota, 274 U. S. 1; 71 Law Ed. 893:

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions. * * *

"In Adams v. Tanner, 244 U. S. 590, 594, 61 L. ed. 1336, 1342, L.R.A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, this court said: 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the funda-

mental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.'

"Concerning a price-fixing statute, Tyson & Bro. v. Banton, 273 U. S. 418, ante, 718, -A.L.R.-, 47 Sup. Ct. Rep. 426 (Feb. 28, 1927), recently declared: It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with; Com. v. O'Brien, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught."

Frost vs. Railroad Commission, 271 U. S. 583; 70 Law Ed. 1101:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The effect of the licenses is to compel the producer and the distributor to surrender their constitutional right to contract as the condition upon which they may do business. License No. 57 goes even further, and abrogates contracts previously made—Article II, paragraphs 1 and 2). This violates the 5th Amendment to the Constitution.

The License Imposes Charges Upon the Individual, Producer and Distributor Without Authority and For the Benefit of Private Persons.

License No. 17, commencing with paragraph 4b, and extending to and including paragraph 5c, of Article III, imposes charges upon producers and distributors. Some of these charges are to be paid to Los Angeles Milk Industry Board and the balance to Milk Producers, Inc., the private corporation then operating a surplus plant. None of these charges are collected by the Government or paid into the Treasury. The money so raised is to be used to pay the expenses of the bodies named, and to equalize the dues of cooperative organizations, and to supply working capital for Milk Producers, Inc., and to pay equalization benefits to such producers as have no market for their milk, except as surplus.

Under License No. 57, similar charges are made and distributed through the operation of the adjustment account mantained by the Market Administrator, as provided in Exhibit A.

Manifestly these charges are for purely private purposes—not for public objects. For this reason the provisions of the licenses just referred to are void. The charges of violation of the licenses contained in the Order to Show Cause issued by the Secretary of Agriculture against each of the Appellees all relate to alleged violations of the provisions levying these charges.

In *Cole vs. LaGrange*, 113 U. S. 1, 28 Law Ed. 896, the court says:

> "The general grant of legislative power in the constitution of the State does not enable the legislature,

> in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities, or towns to contract for private objects, debts which must be paid by taxes. It can not, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

In *City of Los Angeles vs. Lewis,* 173 Cal 777, it is said:

> "The first and fundamental proposition urged upon appeal is that the legislative act is itself unconstitutional, in that it clearly and designedly authorizes taxation for a private purpose, whereas under our system of government taxes can be laid only for a public object—one within the purposes for which governments are established. Indisputably, if the legislature has authorized the doing of this thing, its authorization, under all of the authorities, is void."

A large number of authorities are there cited and the court hold unconstitutional Section 4041 of Political Code authorizing Board of Supervisors to purchase and operate cement manufacturing plants and sell the products of the same.

In *The Citizens Savings & Loan Assn. vs. Topeka City,* 20 Wall, 655, 22 L. Ed. 455, at page 461, it is said:

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. Md., 4 Wheat., 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the National Banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay, with one hand, the power of the government of the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State.' 'Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes.' Cooley, Const. Lim. 479.

"Coulter, J., in Northern Liberties v. St. John's Church, 13 Pa. St. 104, says, very forcibly, 'I think the common mind has every where taken in the

understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.' See, also Pray v. Northern Liberties, 31 Pa. St. 69; Matter of Mayor of N. Y. 11 Johns, 77; Camden v. Allen, 2 Dutch., 398; Sharpless v. Mayor, supra; Hanson v. Vernon, 27 Ia., 47; Whiting v. Fond DuLac, Supra.

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose.

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. Cited favorably in Green vs. Frazier, 253 U. S. 233, 54 L. Ed. 878, 40 Sup. Ct. Rep. 499."

By the licenses, charges are levied against some individuals for the benefit of other individuals. *The authority to make the levy comes not from Congress, but from a law enacted by an executive officer.* The amount

of *the charge* for surplus *is* first *determined by the private corporation which collects it.* No part of the money ever passes through the government treasury.

The License Is An Attempt, by Federal Authorities, to Fix Commodity Prices to Producers, Distributors, and Consumers in the Course of Conducting a Business Which Is Not Burdened With a Public Interest or Duty and Which Is Not Subject to Price Regulation by Federal Authorities or Otherwise and Deprives Plaintiffs of Property Without Due Process of Law in Violation of the Fifth Amendment of the Constitution.

License No. 17 provided that the schedule of wholesale resale and retail prices at which fluid milk shall be distributed and sold by the distributors in the various parts of the Los Angeles sales area shall be those set forth in Exhibit B. Exhibit B sets out thirteen price schedules effective in different parts of the Los Angeles sales area. Exhibit A prescribes the prices to be paid to producers. By these price schedules the Secretary of Agriculture undertakes to fix all of the prices to govern the milk industry within a limited territory within the State of California.

There is not constitutional authority for the Federal government to fix prices either locally or generally. The power of a State in that regard is much greater than the power of the Federal government. The State is invested with police power which, under certain circumstances of emergency, has been held to extend to some

regulation of price. The Federal government has no such police power.

The act of Congress authorizing the Secretary to issue licenses permitting persons to engage in the handling, in the current of interstate or foreign commerce, of agricultural commodities upon such terms and conditions as may be necessary to eliminate unfair practices, etc., cannot be construed to grant authority to do things or exercise powers which are denied to the Federal government by the Constitution.

New State Ice Co. v. Liebmann, 285 U. S. 273, 76 Law Ed. 747, p. 751:

> "It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling or distributing ice, like that of the grocer, the dairyman, the butcher or the baker may be subjected to appropriate regulations in the interest of the public health cannot be doubted; * * *
>
> "Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or

clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. * * *

"Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of the amendment merely by calling them experimental."

Wolf Packing Co. v. Court of Industrial Relations, 262 U. S. 536, 67 Law Ed. 1102, p. 1109:

"It is manifest from an examination of the cases cited under the third head that the mere delcaration

by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices, or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. * * *

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law and omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one

makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

Tyson & Bro. v. Banton, 273 U. S. 429, 71 Law Ed. 718, p. 722:

"Strictly, the question for determination relates only to the maximum price for which an entrance ticket to a theatre, etc., may be resold. But the answer necessarily must be to a question of greater breadth. The statutory declaration (Sec. 167) is that the price of or charge for admission to a theatre, place of amusement or entertainment or other place where public exhibitions, games, contests or performances are held, is a matter affected with a public interest. To affirm the validity of Sec. 172 is to affirm this declaration completely since appellant's business embraces the resale of entrance tickets to all forms of entertainment therein enumerated.

"In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, State Freight Tax Case, 15 Wall. 232, 278, 21 L. ed. 146, 162, and as much, within the protection of the due process of law clauses of the 5th and 14th Amendments. See Carrolton v. Bazzette, 159 Ill. 284, 294, 31 L. R. A. 522, 42 N. E. 837. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because of power may exist to regulate in some particulars it exists to regulate in others or in all.

"The authority to regulate the conduct of a business or to require a license comes from a branch of the police power and which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business (Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 246, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881) but exists only where the business of the property involved has become 'affected with a public interest.' * * * Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its applications not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning like that of many other generalizations, cannot be exactly defined;—it can only be approximated.

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business."

Ribnik v. McBride, 277 U. S. 357, 72 Law Ed. 913, p. 916:

"An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of

public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern.

"The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. Chas. Wolff Packing Co. v. Court of Industrial Relations, supra, p. 536 (67 L. ed. 1108). Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, Tyson & Bros.—United Theatre Ticket Offices v. Banton, supra, pp. 431, 437 (71 L. ed. 723, 725), the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

The Secretary Is Not An Indispensable Party

In this case the records show clearly that the Secretary of Agriculture has done all that he can do as against plaintiffs and appellees. He has issued his orders to show cause; the trial has been had and he has as to each of the plaintiffs made an order finding them guilty of violations and revoking their licenses. Still the defendants in this action continue to make their demands upon the plaintiffs. The Los Angeles Milk Industry Board con-

tinues to demand that the money claimed by it to have accrued under the license be paid to it (R. 65 to 80); Milk Producers, Inc., continues to demand the monies it claims under the licenses, has brought suit against one of the plaintiffs to recover and does not deny that it intends to bring suit against others (R. 80 and 103); defendant Larsen continues to make demands and claims the right to enforce the orders of the Secretary purporting to forfeit the licenses (R. 59); defendant Darger continues to assume and claims the right to enforce the provisions of License No. 57 (R. 59), and it is not denied that the defendant Hall intends to and will institute proceedings to enforce the orders of the Secretary of Agriculture and to enforce the penalties prescribed by the act (R. 110). It is the acts of these defendants, purporting to act under authority of the licenses which plaintiffs contend are void and therefore no justification for their acts, that plaintiffs seek to enjoin. The Secretary of Agriculture has nothing more to do with the matter.

It has been argued that an application under Section 218 of the Regulations might be made to the Secretary for reinstatement under the license (R. 268). Such an application has not been made and obviously would not be made *when the contention of the plaintiffs is that the license is void in its entirety.* The very provisions of the sections of the Regulations referred to preclude such an application, because in no instance can reinstatement be made under this action except upon a showing, satisfactory to the Secretary, that "the applicant is able and willing in good faith to comply with the terms and conditions of the license." The very basis of this litigation is

that plaintiffs are not able or willing to comply with these licenses.

In *Warner Valley Stock Company vs. Smith,* 165 U. S. 28, 41 Law Ed. 621, decided in 1897, the court held that the action could not be maintained against the Commissioner of the General Land Office, after it had abated as to the Secretary because of his resignation.

In *Gnerich v. Rutter,* 265 U. S. 388, 68 Law Ed. 1068, decided in 1924, it was held that the Commissioner of Internal Revenue was a necessary party to a proceeding to enjoin the enforcement of a restriction in a permit to sell intoxicating liquor and that the suit could not be maintained against the Prohibition Director for California alone.

In *Webster v. Fall,* 266 U. S. 507, 69 Law Ed. 411, decided in 1925, it was held that the Secretary of the Interior was a necessary party to a bill by an Osage Indian to compel payment of monies alleged to be due under an Act of Congress.

Those are the three Supreme Court cases cited by appellants, upon which they contend that the Secretary of Agriculture is an indispensable party in this action.

On the other hand, in the case of *American School of Magnetic Healing vs. McAnnulty,* 187 U. S. 94, 47 Law Ed. 90, decided in 1902, it was held that a suit for injunction could be maintained against the local postmaster without joining the Postmaster General where the Postmaster General had ordered mail withheld from the plaintiff.

In *Missouri v. Holland,* 252 U. S. 416, 64 Law Ed. 641, decided in 1920, the court held the jurisdiction

proper in the suit which had been brought against the Game Warden, without joining the Secretary of Agriculture, to enjoin the enforcement of the Migatory Bird Treaty Act and the regulations made by the Secretary of Agriculture under the same.

In *Colorado vs. Toll,* 268 U. S. 228, 69 Law Ed. 927, decided in 1925, later than any of the cases above mentioned, the court reversed an order dismissing a bill for injunction against the Superintendent of a National Park, without joining his superior.

At first and without further examination it may seem that the Supreme Court has announced two inconsistent lines of ruling.

Passing to the decisions of the Circuit Court of Appeal we find, that in the case of *Appalachian Electric Power Co. v. Smith,* 67 Fed. (2d) 451, the Court in the Fourth Circuit reversed a dismissal on the merits and ordered a dismissal for want of jurisdiction.

And in *Moore v. Anderson,* 68 Fed. (2d) 191, the Ninth Circuit held the Secretary of the Interior an indispensable party in an action to enjoin his subordinates and agents from refusing to deliver water under an irrigation project.

On the other hand in *St. Louis Independent Packing Co. vs. Houston,* 215 Fed. 553, it was held (we quote the syllabus):

> "A Federal Court has jurisdiction to determine a suit by a packer or manufacturer of meat food products to require the inspectors of a Department of Agriculture to inspect and pass a meat product under

> the provisions of the Meat Inspection Act, where the chief inspector in charge at the place of suit is before the court, although the Secretary of Agriculture and Chief of Animal Industry, who are also made parties defendant, cannot be served by reason of their non-residence."

In *Broughan v. Blanton Manufacturing Co.,* 243 Fed. 503, the Circuit Court of Appeals of the Eighth Circuit said:

> "It is first contended by the appellants that no injunction could rightfully have been granted against the appellants, because such an injunction could not have been properly granted against the Secretary of Agriculture. In St. Louis Independent Packing Co. v. Houston, 242 Fed. 337, we recently had occasion to fully examine this question, and following that case, we hold that this injunction could properly have issued against the Secretary of Agriculture had he been served or appeared, but having his subordinates there, which, it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them."

In the recent case of *Ryan v. Amazon Petroleum Corporation,* decided May 22, 1934, by the U. S. Circuit Court of Appeals of the Fifth Circuit, the Court says:

> "The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined, although the actors may be authorized and incited by him, so that he would be a proper co-defendant if he were within the court's reach. The court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they are

acting for others. Osborne v. Bank of United States. 9 Wheat, 738; State of Colorado v. Toll, Supt. 268 U. S. 228. This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defendants in their alleged trespass against complainants' rights. There is no more need to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code, or the Congress because it enacted the statute."

I. S. Yarnell, et al. v. Hillsborough Packing Company, et al. (United States Circuit Court of Appeals for the Fifth Circuit, No. 7309, April 14, 1934):

"Appeal from the District Court of the United States for the Southern District of Florida.

"Before Bryan, Sibley and Hutcheson, Circuit Judges—Bryan, Circuit Judge:

"Appellants are here complaining of an interlocutory injunction issued against them at the instance of appellees, and of the denial of their motion to dismiss the bill of complaint. * * *

"But if those regulations are indeed invalid, the Control Committee cannot shield themselves behind the Secretary, or compel compliance therewith in his name. Colorado V. Toll, 268 U. S. 228. It follows that the Secretary was not an indispensable party. As the Control Committee did not admit the illegality of the orders they revoked on the eve of the hearing, nor disclaim any intention to issue similar orders in the immediate future, the case is not moot. United States v. Freight Association, 166 U. S. 290, 308; Sou. Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498. Appellees attack the Control Committee's orders as being null and void,

> and so they had the right to apply to the court for relief in the first instance. Euclid v. Ambler Co., 272 U. S. 365, 386. * * *"

We are thus forced to the conclusion that, either both the Supreme Court and the Circuit Courts of Appeal have been rendering inconsistent decisions, or there is a fundamental difference between those cases where the courts have held the Secretary or the superior officer to be an indispensable party and those cases wherein the same courts have held that the action may be maintained against the subordinate without joining the Secretary or superior officer. We submit the latter is the correct solution of the apparent difficulty; that the two classes of cases involved fundamentally different causes of action; that fundamentally different questions were presented and fundamentally different rights asserted.

The difference between the two classes of cases is pointed out in the case of the *American School of Magnetic Healing vs. McAnnulty,* where the court says:

> "The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief."

Thus when an inferior officer is sued he must justify his acts by some law. If the law which he asserts as justification is unconstitutional or is the order of a superior which was beyond the power of the superior to issue, then, he has presented no justification for his acts and he is the only party necessary to a suit to enjoin him from doing those acts.

As was said in *Ex Parte Young,* 209 U. S. 123, 52 Law Ed. 714, at page 729:

> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding, without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

So, here, if the act in question and the license are void and not applicable to plaintiffs, because they are unconstitutional or because the license is beyond the power of the Secretary, then, the defendants now before the court are stripped of their official or representative character and are subjected in person to the consequences of their individual conduct; they are proceeding without the authority of their Superior.

If this principle is kept in mind while examining the decisions cited by appellants, it will clearly appear that

there is no conflict between those decisions and the ones we have cited. The cases they cite are correct on the facts of those cases, but they have no application to the matters now before this Court.

Warner Valley Stock Co. v. Smith, 165 U. S. 28, 41 Law Ed. 621, was an action for a mandatory injunction against the Secretary of Interior compelling him to issue a patent to plaintiff and to restrain the Secretary and Commissioner of the General Land Office from exercising jurisdiction with respect to disposition of certain lands. During the pendency of the appeal, Smith resigned as Secretary of the Interior. The Court held that the suit abated as to him by his resignation of the office, and said:

> "The main object of the present bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to plaintiff for the lands in question. The mandatory injunction prayed for was in effect equivalent to a writ of mandamus to him. The reasons for holding a suit, which has this object, to have abated as to him, by his resignation are as applicable to this bill in equity as to a petition for a writ of mandamus at common law."

The court then holds that the action cannot continue against the Commissioner alone. As to this the Court says:

> "The purpose of the bill was to *control* the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was

> only incidental and was by way of restraining him from executing the orders of his official head."

There was no question as to the constitutionality of the law or the jurisdiction of the Secretary to act in the premises. The purpose of the bill was to *control* his action in a matter as to which, under a valid law, he had a right to act.

The appellees now before this Court allege in their bill that defendants are attempting to justify their illegal acts under an unconstitutional law and a license which is void and beyond the power of the Secretary to impose. We do not seek to control the action of the Secretary, but we do seek to prevent the illegal acts of these particular individuals.

In Webster v. Fall, 266 U. S. 507, 69 Law Ed. 511, it was held that the Secretary of Interior was a necessary party to a bill by an Osage Indian for a mandatory injunction to compel payment to complainant of monies alleged to be due under an Act of Congress. The Court there stated, regarding the position of the Secretary of the Interior, as follows:

> "The statutory direction to cause quarterly payment to be made is addressed to the Secretary. The power and responsibility are his. Neither Wright nor Wise have any primary authority in the matter, they act only under, and in virtue of, the Secretary's general or special direction. In the absence of which, no payment or disbursement properly can be made. Authority in the superintendent to supervise such payments is not authority to cause them to be made."

Here, again, there was no constitutional question involved nor did the action challenge the jurisdiction. It also asked for a mandatory injunction.

In *Gnerich v. Rutter,* 265 U. S. 388, 68 Law Ed. 388, the Court held that the Commissioner of Internal Revenue was a necessary party to that action, which was brought for an injunction against the Federal Prohibition Director of California. No constitutional question was involved in that case and the decision is limited by the peculiar wording of the National Prohibition Act. It was conceded that the matter was lawfully within the jurisdiction of the Secretary.

In the case of *Appalachian Power Co. v. Smith,* 67 Fed. (2d) 451, the Court used language which shows that the ruling was not based upon any question here involved.

That action had been brought against the members of the Federal Power Commission as individuals and not as commissioners. The Court held that the order complained of had been made prior to the commencement of the action and that under the law the enforcement of the order was entirely in the hands of the attorney general, and said:

> "It is well settled, of course, that equity will, in the proper case restrain officials of the government of acts constituting an invasion of individual rights, where such acts are not authorized by statute or where the statute authorizing them is void because in conflict with some provision of the constitution. But here the defendants are not threatening any action which will prevent the plaintiffs from pro-

> ceeding with the construction of its project. The findings and orders of which complaint is made had already been entered when suit was instituted; and defendants had no further duties with respect to preventing the erection of the project."

The case of *Moore v. Anderson,* 68 Fed. (2d) 191, cited by defendants, involved water rights and was to enjoin agents or subordinates to the Secretary of the Interior from refusing to deliver the quantity of water to which plaintiffs claimed they were entitled by virtue of contracts made by plaintiffs with the Secretary of Interior.

In that case the Circuit Court of Appeals said:

> "In other words, without making the Secretary a party to the suit, appellees are in fact asking this court to construe and interpret a contract entered into between themselves and the Secretary of the Interior on behalf of the United States."

The Court then refers to the case of *Colorado v. Toll,* 268 U. S. 228, as follows:

> "In the Toll case, supra, the Supreme Court held that, under the facts, the Secretary was not an indispensable party. In our opinion, however, the Toll Case is not authority for dispensing with the Secretary in the instant suit. In the Toll Case, the bill alleged that the regulations that the superintendent of the park was seeking to enforce were beyond the authority conferred by act of Congress *and* interfered with the sovereign rights of the state As stated in the opinion, at page 230 of 268 U. S., 45 S. Ct. 505, 506, 69 Law Ed. 927: 'The object of

> the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. (Cases cited.)'
>
> "In thus stating the rule, the Supreme Court used the word 'authority' as it had been used in the beginning of the opinion; that is, 'beyond the authority conferred by the acts of Congress.' Here the suit is against individuals who are attempting to carry out instructions of the Secretary made in pursuance to the contract referred to above."

Thus it is clear that not a single one of the cases cited by appellants was decided upon the issue of a challenge to the constitutionality of the law or a challenge of the authority of the superior officer to act.

Let us now consider the cases cited by us to support our claim that the Secretary is not an indispensable party to this suit.

In *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 Law Ed. 90, the Postmaster General had issued an order excluding the complainant from the United States mails and directing the postmaster at Nevada, Missouri, not to deliver mail to it. This suit for injunction was brought against the local postmaster only. The lower court dismissed the bill, the Supreme Court reversed this. It held that the facts stated in the bill and admitted by the demurrer show that the business

of complainant was not prohibited by the Act of Congress. In the opinion it is said:

> "That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by an action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. * * *
>
> "Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. * * *
>
> "The facts, which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the

action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld.

"In our view of these statutes the complainants had the legal right, under the general acts of Congress relating to the mails, to have their letters delivered to the postoffice as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders, and money itself, all of which were their property as soon as they were deposited in the various postoffices for transmission by mail. They allege, and it is not difficult to see that the allegation is true, that, if such action be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured, if not wholly destroyed, such business being, as far as the laws of Congress are concerned, legitimate and lawful. In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain the refuse to deliver letters addressed to them. The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled."

So, here we say that the license, being the result of a mistaken view of the law, cannot operate as a defense

to this action on the part of the appellants now before the Court nor justify any act on their part.

The case of *Missouri v. Holland,* 252 U. S. 416, 64 Law Ed. 641, was a bill in equity brought against a game warden of the United States to prevent him from attempting to enforce a Migratory Bird Treaty Act and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill was that the statute was an unconstitutional interference with the rights reserved to the states by the Tenth Amendment and that the acts of the defendant done and threatened under that authority invaded the sovereign right of the state and contravened its will manifested in statutes.

The case of *Colorado v. Toll,* 268 U. S. 228, 69 Law Ed. 927, was an action to enjoin the Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which were alleged to be beyond the authority conferred by the Acts of Congress. The bill was dismissed for want of equity by the District Court. The Court says:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi-sovereign authority of the State. There is no question that the bill in equity is a proper remedy; and that it may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431, 64 Law Ed. 641; Philadelphia Co. vs. Stimson, 223 U. S. 605, 56 Law Ed. 570. As the bill was dismissed upon the merits it is not necessary to say more upon this preliminary question."

The decree was reversed, the Court saying near the end of the opinion:

> "In its (plaintiff's) argument it maintains that the acts relied upon by the Superintendent do not have the scope attributed to them, and asserts that if they had purported to go so far, they would have been without authority. The state is entitled to try the question, and to require the alleged grant to be proved."

We again call attention to the several Circuit Court of Appeals cases previously cited herein.

In this action plaintiffs allege that the defendants named herein are doing acts which themselves result in irreparable injury to plaintiffs and which they seek to justify by virtue of the license issued by the Secretary of Agriculture. Plaintiffs allege that this license is, in its entirety, absolutely null and void as to the plaintiffs and that the Federal Government, or any of its agents, has no jurisdiction whatever over plaintiffs or their businesses. If this is true, then the license is a result of the mistaken view of the law and it cannot operate as a defense to this action. Plaintiffs are, therefore, entitled to the relief they now ask against the parties who are doing the acts that injure them. Furthermore, these defendants are not in the position of mere subordinates, carrying out orders as given them from time to time by the Secretary of Agriculture. They are in the position of doing acts which injure the plaintiffs and seeking to justify those acts by a void law. Take for instance the defendant Darger. He claims to act as Market Administrator appointed by the Secretary of Agriculture pur-

suant to the provisions of the license. The mere fact that he is appointed by the Secretary of Agriculture does not make it necessary to bring in the Secretary of Agriculture in order to enjoin illegal acts on his part, any more than it would be necessary to bring in the President in case the suit were to enjoin the acts of the Secretary of Agriculture. The President appoints the Secretary of Agriculture, but when he has been appointed and is acting pursuant to what he claims to be a law applicable to him, it is not necessary to join the President in order to maintain an action to challenge his authority to do the acts. According to the license, the Market Administrator shall perform such duties as are provided for him in the license. When he does the things mentioned in the license his acts are final and conclusive and not subject to review or approval by the Secretary of Agriculture. He is, therefore, assuming to act as an officer administering the provisions of the license.

The law gives to the Secretary the right to issue licenses in certain instances. The Secretary assumed that this was one of the instances in which he was authorized to issue a license. When he issued that license and prescribed the terms and conditions upon which the business of distributing milk could be conducted in Los Angeles, he had completed all that there was for him to do. If the license is valid, the Market Administrator has the authority to do the things therein specified for him to do; but if the license is not valid, then the Market Administrator has no authority whatever. The license is not a mere administrative regulation for the guidance of the deputies of the Secretary of Agriculture. It un-

dertakes to prescribe the law governing the conduct of business and the Market Administrator is undertaking to enforce that law. He is in no different position than any other officer assuming to act under a law. If the law is valid he may act, but if the law is invalid he is simply a usurper and has nothing whatever to justify his act; when he is called to account for his acts, he cannot say that someone else made the law; but, he must show that there is a valid law authorizing his acts.

Plaintiffs are entitled to the relief they ask against the defendants now in court. The Secretary of Agriculture would be a proper party were he within the jurisdiction of the Court, but he is in no sense an indispensable party. To say that the Secretary of Agriculture can, by remaining out of the jurisdiction of the Court, prevent any relief to citizens of California against acts of usurpation on the part of those appointed by him, is equivalent to saying that the Courts are helpless to protect a citizen in his rights when those rights are invaded by persons who are before the Court.

The Bill of Complaint Is Sufficient.

It is contended by appellants that the complaint fails to show that plaintiffs have exhausted their remedies provided by the act. We have just shown that plaintiffs have exhausted all of their remedies insofar as the points involved in this action are concerned; that is, the question as to the validity of the law and validity of the license and the validity of the proceedings the defendants are conducting. All of these have been finally determined against us by the administrative authority.

But it is not necessary for a plaintiff to exhaust administrative remedies before suing in equity where the action is based upon constitutional questions or the validity of the authority under which the officer is proceeding.

It is said in *Euclid v. Amber Realty Co.,* 272 U. S. 365, 71 Law Ed. 303:

> "A motion was made in the court below to dismiss the bill on the ground that, because complainant (appellee) had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitute a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear."

So here, this attack is directed, not against any specific provision or provisions of the license, but against the license as an entirety. The very existence and efforts to maintain the license, if it is void, constitutes a present invasion of plaintiff's property rights and a threat to continue and enlarge that invasion.

In *Pierce v. Society of Sisters,* 268 U. S. 510, 69 Law Ed. 1070, the action was brought to enjoin the enforcement of a statute which was not to become effective for

about two years. The law involved was a law of Oregon requiring that all children attend public schools. The case was decided in the Supreme Court about a year prior to the effective date of the law and the court said:

> "But the injunctions here sought are not against the exercise of any *proper* power. Appellees ask protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate. * * *
>
> "The suits are not premature. The injury to appellees was present and very real—not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of a court of equity."

So, in this case, the plaintiffs are seeking to prevent an irreparable injury by asking protection against arbitrary, unreasonable and unlawful interference with their businesses, and they are not required to wait until their businesses have been destroyed before asking a court of equity to intervene.

In *Work v. Louisiana,* 269 U. S. 250, 70 Law Ed. 259, it is said:

> "It is urged that the trial court was without jurisdiction to entertain the bill, upon the grounds that it was prematurely brought, before the Secretary had exercised his jurisdiction to determine the character of the lands and while the claim was still in the process

> of administration. * * * These objections are based upon a misconception of the purpose of the suit. * * * The bill does not seek an adjudication that the lands were swamp and overflowed lands or to restrain the Secretary from hearing and determining this question, but merely seeks an adjudication of the right of the state to have this question determined without reference to their mineral character, and to require the Secretary to set aside the order requiring it to establish their non-mineral character or suffer the rejection of its claim. In short, it is merely a suit to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character.
>
> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect."

Most of the other assignments of error are embraced within the consideration of the questions of irreparable injury and adequate remedy at law. It will be noted that many of the cases cited by defendants were decided on the proposition that injunction will not lie to control an executive officer in exercising a matter of discretion lawfully committed to him. But such officer has no discretion to do an act without authority. It is also claimed that the officers might be liable in damage. The license says that the Market Administrator shall not be liable to anyone in damages for any act done pursuant to the purported license.

In considering all of these questions it is necessary to keep in mind the nature of this action—that it completely challenges the authority of each of the defendants to do any of the acts of which plaintiffs complain. These plaintiffs come into court, representing that they are citizens of Southern California; that over a period of time, each of them has built up a purely local business in which he has invested his capital and from which he derives a livelihood for himself and his family; that his business is lawful and conducted in a lawful manner; that each of the defendants, pretending to be an officer of the Federal Government, is now interferring with the conduct of that business and doing acts which will destroy the value of the property invested in that business and the good will which they have created for that business; that these defendants seek to justify their acts by the provisions of a purported license issued by the Secretary of Agriculture; plaintiffs show to the court that said purported license is void in its entirety and that the law under which it purports to have been issued is unconstitutional as applied to the businesses of plaintiffs, and also that they are intimidated from standing on what they believe to be their rights and suffering prosecution under the Act, because of the excessive penalties to which they will be subjected in the event the courts should determine that their position is wrong. On these facts they ask the Court to now determine the validity of the license under which defendants claim to act, and if the Court sustains their position, to enjoin the defendants from doing these acts.

The Complaint challenges the constitutionality of the Act as applied in issuing the licenses; it challenges the con-

stitutionality and the validity of both licenses; it challenges the validity of all acts done pursuant to the licenses; it challenges the authority of the defendants named to do the acts which it states they are doing and threatening to do; it shows that valuable property rights of plaintiffs are being invaded and threatened and that the damage would be irreparable, and it shows that plaintiffs are threatened with a multiplicity of civil and criminal proceedings to enforce the void licenses and may be subjected to very excessive penalties. These facts justify relief by injunction.

In *Board of Liquidation v. McComb,* 92 U. S. 531, 23 Law Ed. 623, the United States Supreme Court says:

> "It has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury, thereby, for which adequate compensation cannot be had at law, may have, an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. Osborn v. Bank of U. S., 9 Wheat. 859; Davis v. Gary, 16 Wall. 220."

A law of the State of New York required all operators of taxicabs to carry insurance.

Packard v. Banton, 264 U. S. 140, 68 Law Ed. 596, was an action in equity in the Federal Court to enjoin the enforcement of this law. The Court upheld the law, but sustained the right to bring the action, saying:

> "Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code Paragraph 24, subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined, will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. * * *
>
> "Another preliminary contention is that the bill cannot be sustained because there is a plain, adequate and complete remedy at law; that is, that the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit in equity. The general rule undoubtedly is that a court of equity is without jurisdiction to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it, to try the same right that is in issue there. Re Sawyer, 124 U. S. 200, 209-211, 31 L. ed. 402, 405, 406, 8 Sup. Ct. Rep. 486; Davis and F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498.

"But it is settled that a 'distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property.' Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite Terrace v. Thompson, 263 U. S. 197, ante, 255, 44 Sup. Ct. Rep. 155, decided November 12, 1923, where the cases are collected, and state our conclusion that the present suit falls within the exception, and not the general rule. Ruston v. Des Moines, 176 Iowa, 455, 464, 156 N. W. 883; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18."

Terrace v. Thompson, 263 U. S. 197, 68 Law Ed. 255, was an action to enjoin the enforcement of the Alien Land Law of the State of Washington. This law prohibits aliens who have not declared their intention to become citizens from holding land, and imposes penalties of fine, imprisonment and forfeiture for violations of its provisions. The Court held the law constitutional, but upheld the right to maintain the action to adjudicate the questions involved under the Federal Constitution. The Court says:

"That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical, and efficient as that which equity could afford. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever

it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such case, a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties effected, may be enjoined from such action by a Federal court of equity. * * * If, as claimed, the state act is repugnant to the due process and equal protection clauses of the 14th Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law, which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the attorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment, and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly, Nakatsuka must continue to be deprived of his right to follow his occupation as

> farmer until a landowner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the attorney general to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. Truax. v. Raich, 239 U. S. 33, 37, 39, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. They are not obligated to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution."

In *Santa Fe Pac. R. R. Co. v. Lane,* 244 U. S. 492, 61 Law Ed. 1275, the law involved was a Land Grant Act which required the Company to advance the cost of surveying the lands. The Secretary required the deposit of the total cost of surveying the entire sections, though the portion granted was only part of many of the sections. It was decided that the law did not require the Company to pay for surveying any but the lands granted and that in making such a demand the Secretary plainly exceeded his authority.

The Court says:

> "Thus, the demand was an unauthorized act, done under color of office and the defendant properly may be enjoined from insisting upon or giving effect to

it, unless it be that there is an absence of other elements essential to granting such relief.

"We think the other elements are not wanting. There are millions of acres of unsurveyed lands within the primary limits of the unforfeited portion of the grant of 1866. See Senate Report supra. The plaintiff is entitled to many of the odd-numbered sections within the unsurveyed areas. A claim such as is evidenced by the demand made by the defendant, unless and until it is adjudged unauthorized, will cause a serious cloud upon the plaintiff's rights in the granted lands remaining unsurveyed and be a source of serious embarrassment. Besides, the Act of 1910 contemplates that when a demand thereunder is not complied with the rights of the grantee in the granted lands specified in the demand "shall cease and forfeit" to the United States, and the Secretary shall notify the Attorney General in order that the latter may begin 'proceedings to declare the forfeiture' and to restore the lands to the public domain. The plaintiff was not required, in order to test the validity of the demand, to permit the ninety days to pass and to rely entirely upon defending such suit as might be brought by the Attorney General. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and of course there was no remedy at law that would be as plain, adequate, and complete as a suit such as this against the defendant."

So in the present case plaintiffs are not required to wait until their licenses have been forfeited, their busi-

nesses ruined, and proceedings brought against them for the penalties. The defendants have ruled against plaintiffs on all of the points here presented. If the demands made on plaintiffs under the licenses are unlawful, as plaintiffs verily believe, they are entitled to have defendants enjoined from insisting upon or giving any effect to such licenses.

In *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 Law Ed. 123, the rule is thus stated:

> "We have no doubt the principal of these decisions apply to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts, that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

In *Ex Parte Young*, 209 U. S. 123, 52 Law Ed. 714, the Court reviewed the authorities at some length and concluded:

> 'The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

Ex Parte Young, supra, was cited as controlling authority in *Western Union Telegraph Co. v. Andrews,* 216 U. S. 165, 54 Law Ed. 430.

On the same day, the court in *Ludwig v. Western Union Telegraph Co.,* 216 U. S. 146, 54 Law Ed. 423, says:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.
>
> "This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose. The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of Ex Parte Young, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed, and the case remanded for further proceedings."

In *Dobbins v. Los Angeles,* 195 U. S. 223, 40 Law Ed. 169, the Court says:

> "It is well settled that, where property rights will be destroyed, unlawful interference by criminal pro-

> ceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

Work v. Louisiana, 269 U. S. 250, 70 Law Ed. 259, was an action to enjoin the Secretary of the interior from rejecting a claim to swamp lands granted to Louisiana upon the ground it had failed to show the lands were not mineral in character. The State claimed the Act granting the lands did not require such showing. The Court says:

> "It is clear that if the order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. * * * A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not an indispensable party."

In the recent case of *Ryan v. Amazon Petroleum Corporation,* decided May 22, 1934, by the U. S. Circuit Court of Appeals of the Fifth Circuit, the Court says:

> "The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined, although the actors may be authorized and incited by him so that he would be a proper co-defendant if he were within the court's reach, the court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they are acting for others. Osborne v. Bank of United States, 9 Wheat. 738; State of Colorado v. Toll, Supt., 268 U. S. 228. This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defend-

ants in their alleged trespass against complainant's rights. There is no more needed to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code or the Congress because it enacted the statute."

Colorado v. Toll, 268 U. S. 228, 69 Law Ed. 927, was an action to enjoin the Superintendent of a National Park from enforcing regulations of the Secretary of the Interior for the government of the park. The Court says:

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers or the United States."

In *Philadelphia Co. v. Stimson,* 223 U. S. 605, 56 Law Ed. 570, the case was decided on demurrer to the Bill of Complaint. Among the grounds of demurrer presented were the following:

"1. This proceeding is virtually a suit against the United States.

"2. This court has no jurisdiction to restrain the enforcement of a penalty or prosecution for violation of law.

"3. This court has no jurisdiction to restrain the defendant from instituting criminal proceedings against complainant."

The Court says:

"First: If the conduct of the defendant constitutes an unwarrantable interference with property of

the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.

"Second: The second and third grounds of demurrer, specially stated, raise the question as to the jurisdiction of the court to restrain the defendant from instituting criminal proceedings.

"A court of equity, said this court in Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482, 'has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. . . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade the domain of the courts of common law, or of the executive and administrative department of government.' * * * But a distinction

obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. * * * In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands.

"It is urged that the statute authorizing the Secretary of War to prevent encroachments upon navigable streams is a valid one, and that the decisions cited do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions to the irreparable loss of the complainant, which is the basis of the decree. * * * And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

Regarding the adequacy of the remedy at law, the Supreme Court, in *Ex Parte Young,* 209 U. S. 123, 52 Law Ed. 714, says:

> "It is further objected that there is a plain and adequate remedy at law open to the complainants, and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey an act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was therafter continued and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and, if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery. * * *
>
> "We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment, * * * but the facility of providing it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.
>
> "To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment

> if it should be finally determined that the act was valid. This risk the company ought not to be required to take."

The latest expression of the Supreme Court on the subject, which we have been able to find, is in the opinion of *Sterling v. Constantin*, 287 U. S. 378, 77 Law Ed. 375.

This was an action in which the lower court issued a permanent injunction against the Governor and other officers of Texas, restraining them from enforcing the order for curtailment of oil production which was sought to be enforced by declaring martial law and calling out the state troops. The Supreme Court sustained the judgment and on the question of jurisdiction said:

> "The District Court had jurisdiction. The suit is not against the state. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts, in order that the persons injured may have appropriate relief."

The Court then cites the cases which we have already cited.

The present case presents even a more serious situation than was presented in that case. Here there is no opportunity afforded to make a defense in a court of law. In the *Young* case, an arrest might have been made or an action commenced to collect the penalty as soon as the violation occurred. Here there can be no legal action until all of the damage has been done—until the license

has been revoked and plaintiffs continue in business thereafter.

The property and good will of plaintiffs' businesses has then been destroyed; their relations with their customers has been interrupted, the penalties have accrued and they are without remedy for the damage that has been done. If in the meantime they make the unlawful payments demanded of them by the Market Administrator, their property has been taken without due process of law. There would not even be the possibility of recovery of the monies, so paid, because the Market Administrator is not personally liable and the monies are collected to meet his expenses and to make adjustment payments to other individuals. If they made the payments the money is lost to them forever; if they do not make them, they face the penalties without any possibility of legal relief—except through the equitable relief of this court, until they have been put out of business.

Certainly that is neither a plain, or a speedy or an adequate remedy. It falls so far below that which would be obtained in a court of equity, that comparison is scarcely possible.

They argue that we may make application for reinstatement. But how is this a remedy if plaintiffs never have been subject to the license. Reinstatement, according to the regulations, must be "conditioned upon the applicant's future compliance with the terms and conditions of the license," and expressly does not exempt from fines and penalties incurred. If the license is void, that is worse than no remedy.

From these authorities it seems clear that the allegations of the Bill of Complaint state a cause of action for equitable relief by injunction. The Bill sets forth that irreparable injury to the property rights of plaintiffs is about to be inflicted by defendants claiming to act pursuant to a law which it is alleged violated the Federal Constitution and pursuant to license which it is alleged are beyond the power of the Secretary of Agriculture to impose. The temporary injunction must therefore be sustained unless from the facts now before the Court it is apparent that the law is constitutional and the licenses and all of their provisions are valid and within the power of the Secretary and his appointees. (Bill of Complaint, paragraphs VI, XXI, XXII, and XXIII.)

The Bill of Complaint and Supplemental Bill of Complaint Allege Sufficient Facts to Show Danger and Irreparable Injury to the Plaintiffs.

The plaintiffs' bill of complaint and supplemental bill of complaint show an attempt from the moment License No. 17 became effective, and from the time License No. 57 became effective, on the part of defendants for the respective defendants named in the respective licenses, to enforce the same against the plaintiffs. Statements were forwarded by Los Angeles Milk Industry Board and Milk Producers, Inc., under License No. 17, claiming payment of moneys to them. The license itself attempted to fix the price at which the plaintiffs should purchase and dispose of milk under License No. 57, and the Market Administrator did likewise in fixing prices, making demands for payment of moneys by the plaintiffs. The

plaintiffs contested the right of anyone acting under the terms of License No. 17 to interfere with their respective businesses and refused to comply therewith upon the theory that the license had no application to them, that as to them the license and the Act under which authority it was purported to issue was unconstitutional and void. Thereupon the Secretary of Agriculture haled them before him in an effort to enforce obedience thereto, plaintiffs protesting as to the lack of jurisdiction over them and their businesses. During the hearing License No. 57 became effective, and thereafter the Secretary revoked it as to the plaintiffs. The Agricultural Adjustment Act provides for an extreme penalty for operating without a license.

Thereafter, under the provisions of License No. 17, one of the defendants, Milk Producers, Inc., commenced an action against one of the plaintiffs, Lucerne Cream & Butter Company, to collect moneys claimed owing under the terms of said license.

It will be easily seen where the irreparable injury to the plaintiffs lies, and further their reasons for bringing the instant action and seeking the relief therein sought. To prevent an unwarranted interference with their respective business, which if acquiesced in would have the effect of putting them out of business, causing them to lose a large investment therein running into many thousands of dollars. The direct injury has been suffered and more direct injury is threatened. It is and has been since the promulgation of the first license our claim that the acts complained of were beyond the power of persons committing them, and that the persons so committing

such act have no warrant in law or otherwise for their attempted interference with the businesses of the respective plaintiffs. The Secretary of Agriculture has done all that he could in revoking the licenses of the plaintiffs. Thereafter the situation is as though he had dared the plaintiffs to continue in business. Clearly no more unwarranted interference can be found, if the plaintiffs are correct in their contention that his authority for the acts committed by him and his subordinates is not found in law or in equity.

In commenting upon *Chamber of Commerce vs. Federal Trade Commission,* 280 Fed. 45, relied upon by appellants in this behalf, we would point out that this is not a preliminary hearing, as in that case, sought to be restrained, but a restraint sought after certain acts have been committed and the result complete but attack made upon the jurisdiction of the parties so committing the act, and further that the jurisdictional points were raised, argued and overruled by the so-called administrative branch of the government. The answer to the whole contention of appellants is found in one of their cases, to-wit, *South Porto Rico Sugar Co., et al. vs. Munoz,* 28 Fed. 2d. 820:

> "Judicial interference apart from express statutory delegation must be grounded upon a legal encroachment upon property rights."

In the instant case the encroachment has taken place, and the Secretary of Agriculture and his subordinates, and those named with the enforcement of the license, have adhered "to an erroneous view as to the nature and extent of their jurisdiction."

The case of *Yarnell vs. Hillsboro Packing Co.,* 70 Fed. 2d. 435, is replied upon by appellants. However, a study of this case defeats its attempted application. In opinion the Circuit Court says:

> "It may be that appellants will undertake to go further than they have yet done and assume authority directly or as the Secretary's agents. * * *,"

and remanded the case to the District Court for necessary future amendment in the event of such happening. In that case the parties sought to be restrained had gone no further than in the making of threats. We have a different situation in the instant case. There have been demands for payment of moneys made, and in one instance a suit brought to recover the same, clearly a different showing, and the case is interesting in answering another contention of the plaintiffs—page 438,

> "but if these regulations are indeed invalid the control committee cannot shield themselves behind the Secretary or compel compliance therewith in his name."

The case of *Appalachian Electric Power Company vs. Smith,* 67 Fed. 2d. 451, contains as a statement of general law on this question the following language:

> "It is well settled of course that equity will in a proper case restrain officials of the government from acts constituting an invasion of individual rights, where such acts are not authorized by statute or *where the statute authorizing them is void because in conflict with some provision of the constitution."*

In that case the facts are different than in the case at bar. There the defendants were not threatening any

action. In the instant case the actions have been completed and the threats given effect to, and in fact an attempt made to perfect the demands by the bringing of an action in a court of law.

The correct rule is stated in *Galardo vs. Porto Rico, etc., Co.,* 18 Fed. (2d.) 918, where the Court says:

> "The plaintiff attacks the whole undertaking as invalid; if this contention be sound, it is clear that the threatened injury was imminent and a suit to test the power was most appropriate and timely. * * * If the plan for governmental development of hydro-electric power be unauthorized the plaintiff is entitled to be free from such possibly damaging competition."

The Case Was Not and Is Not Moot

Appellants state under their first point, page 15 of their brief:

> "That upon the revocation of his or its license by the Secretary, the appellee had so disposed of all his property theretofore used in distributing milk in the Los Angeles area."

This statement is contrary to the facts. The facts are (R. 284):

> "* * * * has only released and transferred that portion of its business having to do with the distribution of fluid milk within that territory known and described as the Los Angeles Sales Area. * * * The transfer of such portion of the business of said plaintiff was on account of its fear of prosecution and of the excessive and prohibitive penalties provided for in such license. * * * Said plaintiff intends to and will return to the business of distributing milk

for human consumption within said Los Angeles Sales Area when it can safely do so without the threat of penalties and prosecution hereinbefore mentioned."

The same statement is again made at R. 287. At R. 288, one of the appellees states:

"That it did sell a portion of its equipment which was located in the City of Los Angeles, California. This was solely because of the threat and menace of a fine of One Thousand Dollars per day. * * * But it is engaged in the business of distributing milk and cream at other places in the State of California and desires to and intends to engage in the business of distributing, marketing and handling milk and cream as a distributor in the Los Angeles Sales Area, and will again engage in said business as soon as the menace and threat of said unreasonable penalty and fine has been removed."

And at R. 290, another appellee states:

"It discontinued the business of distributing fluid milk within said Los Angeles Sales Area and thereafter sold, assigned and transferred that portion of its assets theretofore used by it in the business of such distribution of fluid milk within the said Los Angeles Sales Area. * * * Desiring and still desiring to continue to engage in the business of distributing fluid milk and cream in said Los Angeles Sales Area, and only discontinued such business because of the act of said Secretary of Agriculture in so purporting to revocate said license and cause all the large penalties, * * * not exceeding One Thousand Dollars per day each day such business is continued; * * * It is the intention to continue to re-engage in the business of distributing fluid milk in the event

its contentions set forth in the within action and in the original bill and supplemental bill filed herein are upheld in this Court, and it is freed from the threat of such excessive and oppressive penalties as hereinbefore set forth."

The original bill of complaint was filed herein on the 11th day of January, 1934. (R. 48). The License of appellees was revoked on the 28th day of July, 1934, by order of H. A. Wallace, Secretary of Agriculture, and the supplemental complaint of plaintiff herein, or the motion to file the same, was filed on the 9th day of August, 1934 (R. 55), which order was granted on the 4th day of September, 1934. That theretofore, appellant Milk Producers, Inc., had instituted an action about the month of August, 1934, against one of the appellees herein.

Paragraph XLVIII of the Supplemental Bill of Complaint reads as follows: (R. 103).

"That said defendant Milk Producers, Inc., did, on or about the 17th day of July, 1934, commence an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled 'Milk Producers, Inc., plaintiff, vs. Lucerne Cream and Butter Company, et al., defendants,' being No. 376176 in the files and records of said court, to collect and recover judgment for the amounts claimed to be due said Milk Producers, Inc., by said Lucerne Cream and Butter Company under the terms and provisions of said purported License No. 17, as arbitrarily and illegally fixed by the defendant Los Angeles Milk Industry Board as surplus deductions to be made by said Lucerne Cream and Butter Company from its producers for the

periods from November 20, 1933, to May 31, 1934, both dates inclusive, as more particularly hereinbefore set forth in paragraphs X, XIII, XVI, XIX and XXII of this supplemental bill for injunction, and in the amounts as purportedly last fixed by the said Los Angeles Milk Industry Board as aforesaid, and threatens to and will institute similar actions against each of the other plaintiffs herein to collect like amounts as set forth in said paragraphs X, XIII, XVI, XIX and XXII aforesaid, and threatens to and will prosecute such suits to judgment unless restrained from so doing by order of this court."

We believe it to be a well established point of law that:

"It is not every change in circumstances that might be said to render a case a moot one which would require a dismissal of the appeal. Whenever the judgment, if left unreversed, will preclude the party against whom it is rendered, as to a fact vital to his rights, though the judgment if affirmed might not be directly enforceable by reason of lapse of time or change of circumstances, it cannot be said that merely a moot question is involved." 2 R. C. L. 170.

The case is not moot for the reason that each of the appellees are engaged in the milk business and each one of them as shown by their affidavits desire to re-engage in the business of distributing milk, which they are precluded from doing by fear of heavy penalties visited on them by the Secretary of Agriculture, the United States District Attorney, and the other appellants in this action. The cases quoted by the government in its brief *are no where close in point.*

Mills vs. Green, 159 U. S. 651, cited by appellant, is not in point as in that case the appellant therein sought an injunction against the Supervisor of Registration from supervising the registration of voters for a Constitutional Convention; that he was desirous of voting for delegates therein at this election to be held the third Tuesday of August, 1895. On September 4, 1895, the plaintiff and appellant appealed to the Supreme Court of the United States, and the appeal was entered on September 19, 1895. Thereafter the appeal was dismissed for no judgment of the Supreme Court could effect the result of that election.

Brownlow vs. Schwartz, 261 U. S. 216 relied upon by appellant. It was a case where plaintiff prayed for a Writ of Mandamus to require the building inspector to issue a permit to erect a building in Washington. Before the appeal reached the Supreme Court, the Inspector of Buildings issued the permit. The building was built and had been sold. The Court therefore dismissed the appeal for a judgment. Issuing a Writ of Mandate compelling the issuance of the building permit would have been a nullity as the building was already built.

The case of *Heitmuller vs. Stokes,* 256-359, is not in point. Plaintiff brought suit in the District of Columbia to recover possession of a building. Judgment went for the defendant. The plaintiff appealed to the Supreme Court of the District of Columbia. The Supreme Court entered judgment for the plaintiff. The only question involved was right of possession. Plaintiff sold the premises and made a showing before the Supreme Court that he was no longer entitled to the relief sought and the Supreme Court dismissed the action.

California vs. San Pablo, 149 U. S. 308, was a case where the State of California had sued the Railroad Company for taxes. During the pendency of the action before the Supreme Court the Railway Company tendered the money to the State and upon its refusal to accept, it deposited the same together with penalties, interest and attorney's fees in a Bank in accordance with the provisions of Section 1500 of the Civil Code of California.

The Supreme Court therefore dismissed the action because the case was moot.

As was stated by that Court on page 14:

> "The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it." The case is clearly not in point.

Appellants also rely upon *United States vs. Hamburg-American Company,* 239 U. S. 466. This was an action involving an action by the United States against steamship companies under the Sherman Anti-Trust Act. These companies had ceased their business by reason of the world war in 1915. The court took judicial knowledge of the European war and dismissed the action because the illegal combination had ceased to exist by reason of the cessation of steamship activities by reason of the war.

Commerce Cable Company v. Burleson, 250 U. S. 360, was dismissed by the Supreme Court because the property of the Cable Company had been restored to it by Presidential order. Therefore, judgment ordering its

restoration could not do more than already had been done in the case.

The case of *United States v. Anchor Coal Company,* 279 U. S. 812, and is a percuriam opinion setting forth no facts. The correct application of the law, we submit, is set forth in *United States v. Freight Association,* 166 U. S. 290, page 304, a motion was made upon affidavits to dismiss the appeal. The motion was denied and the Court said at page 308:

> "The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate and salutary one, and that it or one like it is necessary to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion."

Also in *Southern Pacific Terminal Company vs. Interstate Commerce Commission,* 219 U. S. 498, the Court denying the motion to dismiss, said:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

Again, in the recent case of *Abie State Bank v. Bryan,* 282 U. S. 765, where the law of assessments was repealed by the Nebraska legislature, and a motion to dismiss the appeal was made, Mr. Chief Justice Hughes delivering the opinion, at page 781, said:

> "The appellees, who are state officers, urge that by this legislation the case has become moot. The appellants, and the appellees who are intervening depositors, assert the contrary, and we agree with the latter view. Despite the repeal of section 8028, the assessment of December 15, 1928, which was assailed in this suit, is continued in effect, and the amount due thereunder is made a part of the depositors' final settlement fund. The later special assessments, to which the new act refers (those of April 17, 1929, and January 2, 1930), also remain in force. While the repeal of section 8028 prevents further assessments under the old law, still assess-

ments which were enjoined by the District Court, and which were sustained by the judgment of the Supreme Court, are to be paid, and the amounts are to be applied as the act of 1930 directs. If, taking into consideration the limitations of the new legislation, the appellants could still be considered to have constitutional grounds for objecting to the collection of the special assessments which were the subject of their petition, they are not deprived of their right by the statute which leaves them with liability for those assessments. It would still be possible for this Court to grant appropriate relief. Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 433. See Groesbeck v. Duluth, South Shore & A. Ry. Co., 250 U. S. 607, 609; Boston v. Jackson, 260 U. S. 309, 313."

Groesbeck v. Duluth, South Shore & Atlantic Railway Co., 250 U. S. 607; 63 L. Ed. 1167. The Michigan law fixed a two cent rate on railroads. This action was to enjoin the enforcement of that law. Before the appeal was heard, the statute was repealed, and it was argued that the question had become moot. The Court said:

"But the case has not become moot for the following reason: On continuing the restraining order the Railway was required to issue to all intrastate passengers receipts by which it agreed to refund, if the act should be held valid, the amount paid in excess of a two-cent fare. Later the Railway was required to deposit, subject to the order of the court, such amounts thereafter collected. The fund now on deposit exceeds $800,000, and the refund coupons are still outstanding. In order to determine the rights of coupon holders and to dispose of this fund it is necessary to decide whether the Act of 1911 was, as respects this railroad, confiscatory."

We therefore respectfully submit that the point is not well taken, that the question is not moot, for the reasons shown herein, to-wit: That plaintiffs and appellees are each still engaged in business; that they are still subject to suits and demands by the defendants and appellants, and that the Court therefore properly issued its injunction.

Conclusion

In conclusion we respectfully submit that this Court is now asked to find on the *argument of an ex parte affidavit and without any action or declaration by Congress that that which has heretofore uniformly been held by the Court not to be within the commerce clause has by reason of the depression become subject to the commerce clause* and to sustain an administrative license purporting to be issued under color of authority of a statute which goes no further than to authorize licenses "in the current of interstate or foreign commerce," and when such licenses on their face purport only to attempt to regulate production and distribution of milk in a small defined area entirely within one state.

We submit that under the law these licenses cannot be sustained and that, therefore, the injunction was properly issued.

Respectfully submitted,

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